VOTE FOR

CLINTON T. HORTON

Republican Candidate for

MEMBER OF ASSEMBLY

2nd DISTRICT

Whose Progressive Record at Albany Last Year

ENTITLES HIM TO RE-ELECTION

No. 13 Under the Eagle

"Law merchant" a [illegible] portion of [illegible] interpretation of the [illegible] countries [illegible] law for its parents [illegible] law of England, and [illegible] whole mercantile [illegible] principles [illegible] general commerce [illegible] justice have established [illegible] of merchants and mariners.

THE

NEGOTIABLE INSTRUMENTS LAW

FROM THE DRAFT PREPARED FOR THE COMMISSIONERS ON UNIFORMITY OF LAWS, AND ENACTED IN ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING.

THE FULL TEXT OF THE LAW AS ENACTED, WITH COPIOUS ANNOTATIONS.

BY

JOHN J. CRAWFORD,

Of the New York Bar,

BY WHOM THE STATUTE WAS DRAWN.

THIRD EDITION.

NEW YORK:

BAKER, VOORHIS AND COMPANY.

1908.

J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y

PREFACE TO THIRD EDITION.

Since the second edition of this book was published in 1902, the Negotiable Instruments Law has been enacted in the following States, viz.: Alabama, Arizona, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, West Virginia and Wyoming. In all but one of these, the language of the Act is the same as that in the New York statute, except in a few minor and unimportant particulars. The Illinois statute, however, contains some provisions materially different. These consist mainly of proposed amendments submitted to the Commissioners on Uniformity of Laws at their annual meeting in 1900, but which the Commissioners, by a unanimous vote, after a full report from a committee appointed to consider the subject, rejected as undesirable. In the six years that have elapsed since the publication of the second edition, the statute has been applied or construed in more than two hundred cases. All of these are cited in the present edition. The numbers of the sections vary in the different States, and for convenience of reference a table of corresponding sections has been added.

JOHN J. CRAWFORD.

30 BROAD STREET, NEW YORK, June 10, 1908.

PREFACE TO SECOND EDITION.

When the first edition of this book was published, the Negotiable Instruments Law had been passed in four States, viz.: New York, Connecticut, Florida and Colorado. In the four years which have elapsed since then it has been enacted in Massachusetts, Rhode Island, Pennsylvania, Maryland, Virginia, North Carolina, Tennessee, Wisconsin, North Dakota, Utah, Oregon and Washington, and has also been adopted by Congress as the law of the District of Columbia. In most instances the law has been passed in the form proposed by the Commissioners on Uniformity of Laws; but in several States a few minor changes have been made. These are indicated in the notes to this edition. I have also endeavored to point out the changes made by the law in the different States, and have added to the notes citations to the decisions in all the States where the statute is now in force. It is somewhat notable that so few cases have arisen under the Act. The reported cases number only about a half dozen in all; and in most of these the court was required only to apply the act, and not to construe it. Perhaps nothing could better demonstrate that the practical working of the law has been satisfactory. As in the previous edition, the text is that of the New York Act. For the information of the profession outside of New York it may be stated that the hiatus in the section numbers does not indicate the omission of any sections, but is in accordance with the plan adopted in all the "General Laws" of this State.

JOHN J. CRAWFORD.

30 BROAD STREET, NEW YORK, February 1, 1902.

PREFACE TO FIRST EDITION.

In 1895 the Conference of Commissioners on Uniformity of Laws, which met that year in Detroit, instructed the Committee on Commercial Law to have prepared a codification of the law relating to bills and notes. The matter was referred to a sub-committee consisting of Lyman D. Brewster of Connecticut, Henry C. Wilcox of New York and Frank Bergen of New Jersey; and I was employed by the sub-committee to draw the proposed law. When completed, the draft, with my notes, was submitted to the sub-committee, who printed it and sent copies to each member of the conference, and also to many prominent lawyers and law professors, and to several English judges and lawyers, with an invitation for suggestions and criticisms. The draft was submitted to the conference which met at Saratoga in August, 1896; and the Commissioners who were in attendance, being twenty-seven in all, and representing fourteen different States, went over it section by section, and made some amendments therein, most of which were such changes in the existing law as I had not felt at liberty to incorporate into the original draft. The draft as thus amended was adopted by the conference; and in such form it has been submitted to the legislatures of many of the States. It has been passed and has become a law in New York, Connecticut, Colorado and Florida. I am informed that the Commissioners on Uniformity of Laws will make special effort to have it adopted in many other States at the next session of their legislatures.

The text of the law as printed in this edition is that of the New York statute. This is precisely the same as that of

the draft published by the Commissioners on Uniformity of Laws, and the statute as passed in Connecticut, Colorado and Florida, except that the section numbers have been changed, and section headings introduced, to conform the statute to the plan adopted by the Commissioners of Statutory Revision in their revision of the General Laws, and three sections, viz., 330, 331 and 332, relating to special matters heretofore embodied in other New York statutes, have been added.

In the course of the passage of the bill through the New York Legislature a number of errors were made in the engrossing and were not detected until too late to be corrected. I have indicated these by asterisks and foot-notes. Probably none of them are of such a character as to effect the meaning, since they are so obviously mistakes.

In submitting this edition of the statute to the public, I embrace this my first opportunity to publicly express my appreciation of the unvarying courtesy and consideration shown me by the Commissioners on Uniformity of Laws, and especially by those composing the sub-committee having the preparation of the bill in charge.

JOHN J. CRAWFORD.

30 BROAD STREET, NEW YORK, July 8, 1897.

TABLE OF CORRESPONDING SECTIONS OF THE STATUTES.

N. Y.	Commissioner's draft.*	Ariz.	Ill.	Kans.	Md.	Mich.	Nebr.	Ohio.	R. I.	Wis.
1	190	.....	189	1	13	1	.....	.....	1	1675
2	191	3487	190	2	14	2	189	3178	2	1675
3	192	3488	191	3	15	2	190	3178a	3	1675
4	193	3489	192	4	16	2	191	3178b	4	1675
5	194	3490	193	5	17	2	192	3178c	5	1675
6	195	.....	194	6	18	2	193	3178d	6	1675
7	196	3491	195	7	19	2	194	3178e	7	1675
20	1	3304	1	8	20	3	1	3171	9	1675-1
21	2	3305	2	9	21	4	2	3171a	10	1675-2
22	3	3306	3	10	22	5	3	3171b	11	1675-3
23	4	3307	4	11	23	6	4	3171c	12	1675-4
24	5	3308	5	12	24	7	5	3171d	13	1675-5
25	6	3309	6	13	25	8	6	3171e	14	1675-6
26	7	3310	7	14	26	9	7	3171f	15	1675-7
27	8	3311	8	15	27	10	8	3171g	16	1675-8
28	9	3312	9	16	28	11	9	3171h	17	1675-9
29	10	3313	10	17	29	12	10	3171i	18	1675-10
30	11	3314	11	18	30	13	11	3171j	19	1675-11
31	12	3315	12	19	31	14	12	3171k	20	1675-12
32	13	3316	13	20	32	15	13	3171l	21	1675-13
33	14	3317	14	21	33	16	14	3171m	22	1675-14
34	15	3318	15	22	34	17	15	3171n	23	1675-15
35	16	3319	16	23	35	18	16	3171o	24	1675-16
36	17	3320	17	24	36	19	17	3171p	25	1675-17
37	18	3321	18	25	37	20	18	3171q	26	1675-18
38	19	3322	19	26	38	21	19	3171r	27	1675-19
39	20	3323	20	27	39	22	20	3171s	28	1675-20
40	21	3324	21	28	40	23	21	3171t	29	1675-21
41	22	3325	22	29	41	24	22	3171u	30	1675-22
42	23	3326	23	30	42	25	23	3171v	31	1675-23
50	24	3327	24	31	43	26	24	3171w	32	1675-50
51	25	3328	25	32	44	27	25	3171x	33	1675-51
52	26	3329	26	33	45	28	26	3171y	34	1675-52
53	27	3330	27	34	46	29	27	3171z	35	1675-53
54	28	3331	28	35	47	30	28	3172	36	1675-54
55	29	3332	29	36	48	31	29	3172a	37	1675-55
60	30	3333	30	37	49	32	30	3172b	38	1676
61	31	3334	31	38	50	33	31	3172c	39	1676-1
62	32	3335	32	39	51	34	32	3172d	40	1675-2
63	33	3336	33	40	52	35	33	3172e	41	1676-3
64	34	3337	34	41	53	36	34	3172f	42	1676-4
65	35	3338	35	42	54	37	35	3172g	43	1676-5
66	36	3339	36	43	55	38	36	3172h	44	1676-6
67	37	3340	37	44	56	39	37	3172i	45	1676-7
68	38	3341	38	45	57	40	38	3172j	46	1676-8
69	39	3342	39	46	58	41	39	3172k	47	1676-9
70	40	3343	40	47	59	42	40	3172l	48	1676-10
71	41	3344	41	48	60	43	41	3172m	49	1676-11
72	42	3345	42	49	61	44	42	3172n	50	1676-12
73	43	3346	43	50	62	45	43	3172o	51	1676-13
74	44	3347	44	51	63	46	44	3172p	52	1676-14
75	45	3348	45	52	64	47	45	3172q	53	1676-15

* These are the numbers of the sections as enacted in the following states: Alabama, Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming. In some instances these numbers have been changed by incorporating the act in a code.

Table of Corresponding Sections of the Statutes — (*Continued*).

N. Y.	Commissioner's draft.*	Ariz.	Ill.	Kans.	Md.	Mich.	Nebr.	Ohio.	R. I.	Wis.
76	46	3349	46	53	65	48	46	3172r	54	1676–16
77	47	3350	47	54	66	49	47	3172s	55	1676–17
78	48	3351	48	55	67	50	48	3172t	56	1676–18
79	49	3352	49	56	68	51	49	3172u	57	1676–19
80	50	3353	50	57	69	52	50	3172v	58	1676–20
90	51	3354	51	58	70	53	51	3172w	59	1676–21
91	52	3355	52	59	71	54	52	3172x	60	1676–22
92	53	3356	53	60	72	55	53	3172y	61	1676–23
93	54	3357	54	61	73	56	54	3172z	62	1676–24
94	55	3358	55	62	74	57	55	3173	63	1676–25
95	56	3359	56	63	75	58	56	3173a	64	1676–26
96	57	3360	57	64	76	59	57	3172b	65	1676–27
97	58	3361	58	65	77	60	58	3173c	66	1676–28
98	59	3362	59	66	78	61	59	3173d	67	1676–29
110	60	3363	60	67	79	62	60	3173e	68	1677
111	61	3364	61	68	80	63	61	3173f	69	1677–1
112	62	3365	62	69	81	64	62	3173g	70	1677–2
113	63	3366	63	70	82	65	63	3173h	71	1677–3
114	64	3367	64	71	83	66	64	3173i	72	1677–4
115	65	3368	65	72	84	67	65	3173j	73	1677–5
116	66	3369	66	73	85	68	66	3173k	74	1677–6
117	67	3370	67	74	86	69	67	3173l	75	1677–7
118	68	3371	68	75	87	70	68	3173m	76	1677–8
119	69	3372	69	76	88	71	69	3173n	77	1677–9
130	70	3373	70	77	89	72	70	3173o	78	1678
131	71	3374	71	78	90	73	71	3173p	79	1678–1
132	72	3375	72	79	91	74	72	3173q	80	1678–2
133	73	3376	73	80	92	75	73	3173r	81	1678–3
134	74	3377	74	81	93	76	74	3173s	82	1678–4
135	75	3378	75	82	94	77	75	7173t	83	1678–5
136	76	3379	76	83	95	78	76	3173u	84	1678–6
137	77	3380	77	84	96	79	77	3173v	85	1678–7
138	78	3381	78	85	97	80	78	3173w	86	1678–8
139	79	3382	79	86	98	81	79	3173x	87	1678–9
140	80	3383	80	87	99	82	80	3173y	88	1678–10
141	81	3384	81	88	100	83	81	3173z	89	1678–11
142	82	3385	82	89	101	84	82	3174	90	1678–12
143	83	3386	83	90	102	85	83	3174a	91	1678–13
144	84	3387	84	91	103	86	84	3174b	92	1678–14
145	85	3388	85	92	104	87	85	3174c	93	1678–15
146	86	3389	86	93	105	88	86	3174d	94	1678–16
147	87	3390	...	94	106	89	...	3174e	95	1678–17
148	88	3391	87	95	107	90	87	3174f	96	1678–18
160	89	3392	88	96	108	91	88	3174g	97	1678–19
161	90	3393	89	97	109	92	89	3174h	98	1678–20
162	91	3394	90	98	110	93	90	3174i	99	1678–21
163	92	3395	91	99	111	94	91	3174j	100	1678–22
164	93	3396	92	100	112	95	92	3174k	101	1678–23
165	94	3397	93	101	113	96	93	3174l	102	1678–24
166	95	3398	94	102	114	97	94	3174m	103	1678–25
167	96	3399	95	103	115	98	95	3174n	104	1678–26
168	97	3400	96	104	116	99	96	3174o	105	1678–27
169	98	3401	97	105	117	100	97	3174p	106	1678–28
170	99	3402	98	106	118	101	98	3174q	107	1678–29

* These are the numbers of the sections as enacted in the following states: Alabama, Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming. In some instances these numbers have been changed by incorporating the act in a code.

TABLE OF CORRESPONDING SECTIONS OF THE STATUTES — (*Continued*).

N. Y.	Commissioner's draft.*	Ariz.	Ill.	Kans.	Md.	Mich.	Nebr.	Ohio.	R. I.	Wis.
171	100	3403	99	107	119	102	99	3174r	108	1678–30
172	101	3404	100	108	120	103	100	3174s	109	1678–31
173	102	3405	101	109	121	104	101	3174t	110	1678–32
174	103	3406	102	110	122	105	102	3174u	111	1678–33
175	104	3407	103	111	123	106	103	3174v	112	1678–34
176	105	3408	104	112	124	107	104	3174w	113	1678–35
177	106	3409	105	113	125	108	105	3174x	114	1678–36
178	107	3410	106	114	126	109	106	3174y	115	1678–37
179	108	3411	107	115	127	110	107	3174z	116	1678–38
180	109	3412	108	116	128	111	108	3175	117	1678–39
181	110	3413	109	117	129	112	109	3175a	118	1678–40
182	111	3414	110	118	130	113	110	3175b	119	1678–41
183	112	3415	111	119	131	114	111	3175c	120	1678–42
184	113	3416	112	120	132	115	112	3175d	121	1678–43
185	114	3417	113	121	133	116	113	3175e	122	1678–44
186	115	3418	114	122	134	117	114	3175f	123	1678–45
187	116	3419	115	123	135	118	115	3175g	124	1678–46
188	117	3420	116	124	136	119	116	3175h	125	1678–47
189	118	3421	117	125	137	120	117	3175i	126	1678–48
200	119	3422	118	126	138	121	118	3175j	127	1679
201	120	3423	119	127	139	122	119	3175k	128	1679–1
202	121	3424	120	128	140	123	120	3175l	129	1679–2
203	122	3425	121	129	141	124	121	3175m	130	1679–3
204	123	3426	122	130	142	125	122	3175n	131	1679–4
205	124	3427	123	131	143	126	123	3175o	132	1679–5
206	125	3428	124	132	144	127	124	3175p	133	1679–6
210	126	3429	125	133	145	128	125	3175q	134	1680
211	127	3430	126	134	146	129	126	3175r	135	1680a
212	128	3431	127	135	147	130	127	3175s	136	1680b
213	129	3432	128	136	148	131	128	3175t	137	1680c
214	130	3433	129	137	149	132	129	3175u	138	1680d
215	131	3434	130	138	150	133	130	3175v	139	1680e
220	132	3435	131	139	151	134	131	3175w	140	1680f
221	133	3436	132	140	152	135	132	3175x	141	1680g
222	134	3437	133	141	153	136	133	3175y	142	1680h
223	135	3438	134	142	154	137	134	3175z	143	1680i
224	136	3439	135	143	155	138	135	3176	144	1680j
225	137	3440		144	156	139	136	3176a	145	1680k
226	138	3441	136 137	145	157	140	137	3176b	146	1680l
227	139	3442	138	146	158	141	138	3176c	147	1680m
228	140	3443	139	147	159	142	139	3176d	148	1680n
229	141	3444	140	148	160	143	140	3176e	149	1680o
230	142	3445	141	149	161	144	141	3176f	150	1680p
240	143	3446	142	150	162	145	142	3176g	151	1681
241	144	3447	143	151	163	146	143	3176h	152	1681–1
242	145	3448	144	152	164	147	144	3176i	153	1681–2
243	146	3449	145	153	165	148	145	3176j	154	1681–3
244	147	3450	146	154	166	149	146	3176k	155	1681–4
245	148	3451	147	155	167	150	147	3176l	156	1681–5
246	149	3452	148	156	168	151	148	3176m	157	1681–6
247	150	3453	149	157	169	152	149	3176n	158	1681–7
248	151	3454	150	158	170	153	150	3176o	159	1681–8

* These are the numbers of the sections as enacted in the following states: Alabama, Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming. In some instances these numbers have been changed by incorporating the act in a code.

TABLE OF CORRESPONDING SECTIONS OF THE STATUTES — (*Concluded*).

N. Y.	Commissioner's draft.*	Ariz.	Ill.	Kans.	Md.	Mich.	Nebr.	Ohio.	R. I.	Wis.
260	152	3455	151	159	171	154	151	3176p	160	1681–9
261	153	3456	152	160	172	155	152	3176q	161	1681–10
262	154	3457	153	161	173	156	153	3176r	162	1681–11
263	155	3458	154	162	174	157	154	3176s	163	1681–12
264	156	3459	155	163	175	158	155	3176t	164	1681–13
265	157	3460	156	164	176	159	156	3176u	165	1681–14
266	158	3461	157	165	177	160	157	3176v	166	1681–15
267	159	3462	158	166	178	161	158	3176w	167	1681–16
268	160	3463	159	167	179	162	159	3176x	168	1681–17
280	161	3464	160	168	180	163	160	3176y	169	1681–18
281	162	3465	161	169	181	164	161	3176z	170	1681–19
282	163	3466	162	170	182	165	162	3177	171	1681–20
283	164	3467	163	171	183	166	163	3177a	172	1681–21
284	165	3468	164	172	184	167	164	3177b	173	1681–22
285	166	3469	165	173	185	168	165	3177c	174	1681–23
286	167	3470	166	174	186	169	166	3177d	175	1681–24
287	168	3471	167	175	187	170	167	3177e	176	1681–25
288	169	3472	168	176	188	171	168	3177f	177	1681–26
289	170	3473	169	177	189	172	169	3177g	178	1681–27
300	171	3474	170	178	190	173	170	3177h	179	1681–28
301	172	3475	171	179	191	174	171	3177i	180	1681–29
302	173	3476	172	180	192	175	172	3177j	181	1681–30
303	174	3477	173	181	193	176	173	3177k	182	1681–31
304	175	3478	174	182	194	177	174	3177l	183	1681–32
305	176	3479	175	183	195	178	175	3177m	184	1681–33
306	177	3480	176	184	196	179	176	3177n	185	1681–34
310	178	3481	177	185	197	180	177	3177o	186	1681–35
311	179	3482	178	186	198	181	178	3177p	187	1681–36
312	180	3483	179	187	199	182	179	3177q	188	1681–37
313	181	3484	180	188	200	183	180	3177r	189	1681–38
314	182	3485	181	189	201	184	181	3177s	190	1681–39
315	183	3486	182	190	202	185	182	3177t	191	1681–40
320	184	3487	183	191	203	186	183	3177u	192	1684
321	185	3487	184	192	204	187	184	3177v	193	1684–1
322	186	3487	185	193	205	188	185	3177w	194	1684–2
323	187	3487	186	194	206	189	186	3177x	195	1684–3
324	188	3487	187	195	207	190	187	3177y	196	1684–4
325	189	3487	188	196	208	191	188	3177z	197	1684–5

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The Negotiable Instruments Law.

THE LAW HAS BEEN ENACTED IN THE FOLLOWING STATES AND TERRITORIES:

ALABAMA.— Laws 1907, Chap. 722; Code 1907, Chap. 115, Secs. 4958–5149.

ARIZONA.— Rev. Stat. 1901, p. 852, title 49 of Civil Code, Secs. 3304–3491; Laws 1905, Chap. 23.

COLORADO.— Laws 1897, Chap. 64.

CONNECTICUT.— Laws 1897, Chap. 74; Genl. Stat. Rev. 1902, p. 1028.

DISTRICT OF COLUMBIA.— Laws U. S. 1899; Laws U. S. 1901; Laws U. S. 1902, Secs. 1304–1493.

FLORIDA.— Laws 1897, Chap. 4524; Genl. Stat. 1906, p. 1147; Secs. 2394–3099.

IDAHO.— Laws 1903, p. 380.

ILLINOIS.— Laws 1907, p. 403.

IOWA.— Laws 1902, Chap. 130; Laws 1906, Chap. 149; Code Supp. 1902, p. 352, Chap. 3-A, Secs. 3060-a1–3060-a198.

KANSAS.— Laws 1905, Chap. 310; Genl. Stat. 1905, p. 967, Chap. 70, Secs. 4533–4732.

KENTUCKY.— Laws 1904, Chap. 102.

LOUISIANA.— Laws 1904, Chap. 64.

MARYLAND.— Laws 1898, Chap. 119.

MASSACHUSETTS.— Laws 1898, Chap. 533; Laws 1899, Chap. 130; Rev. Laws 1902, p. 628, Chap. 73, Secs. 18–212.

MICHIGAN.— Laws 1905, Chap. 265.

MISSOURI.— Laws 1905, p. 243; Laws 1907, p. 366.

MONTANA.— Laws 1903, Chap. 121.

NEBRASKA.— Laws 1905, Chap. 83; Comp. Stat. 1907, Chap. 41, Secs. 3558-a1–3558-a198.

NEVADA.— Laws 1907, Chap. 62.

NEW JERSEY.— Laws 1902, Chap. 184.

NEW MEXICO.— Laws 1907, Chap. 83.

NEW YORK.— Laws 1897, Chap. 612; Laws 1898, Chap. 336; Laws 1904, Chap. 287.

NORTH CAROLINA.— Laws 1899, Chap. 733; Laws 1905, Chap. 327; Laws 1907, Chap. 807; Revisal, 1905, p. 655, Chap. 54, Secs. 2151–2346.

NORTH DAKOTA.— Laws 1899, Chap. 113; Civil Code, 1905, p. 1002, Chap. 90, Secs. 6303–6498.

OHIO.— Laws 1902, p. 162; Bates' Annot. Stat. (5th ed.) pp. 1800a–1807, Secs. 3171–3178e.

OREGON.— Laws 1899, p. 18; Bellinger & Cotton's Annot. Codes & Stat., p. 1440, Secs. 4403–4594.

PENNSYLVANIA.— Laws 1901, No. 162.

RHODE ISLAND.— Laws 1899, Chap. 674.

TENNESSEE.— Laws 1899, Chap. 94.

UTAH.— Laws 1899, Chap. 83.

VIRGINIA.— Laws 1898, Chap. 866; Laws 1906, Chap. 219; Code, 1904, Chap. 133a, Sec. 2841a.

WASHINGTON.— Laws 1899, Chap. 149.

WEST VIRGINIA.— Laws 1907, Chap. 81.

WISCONSIN.— Laws 1899, Chap. 356; Laws 1901, Chap. 41; Laws 1905, Chap. 262; Laws 1907, Chap. 361.

WYOMING.— Laws 1905, Chap. 43.

THE NEGOTIABLE INSTRUMENTS LAW.

THE NEGOTIABLE INSTRUMENTS LAW.

A general act relating to Negotiable Instruments (being an act to establish a law uniform with the laws of other States on that subject).*

Article I. General provisions. (§§ 1–7.)
II. Form and interpretation of negotiable instruments. (§§ 20–42.)
III. Consideration. (§§ 50–55.)
IV. Negotiation. (§§ 60–80.)
V. Rights of holder. (§§ 90–98.)
VI. Liabilities of parties. (§§ 110–119.)
VII. Presentment for payment. (§§ 130–148.)
VIII. Notice of dishonor. (§§ 160–189.)
IX. Discharge of negotiable instruments. (§§ 200–206.)
X. Bills of exchange; form and interpretation. (§§ 210–215.)
XI. Acceptance. (§§ 220–230.)
XII. Presentment for acceptance. (§§ 240–248.)
XIII. Protest. (§§ 260–268.)
XIV. Acceptance for honor. (§§ 280–290.)
XV. Payment for honor. (§§ 300–306.)
XVI. Bills in a set. (§§ 310–315.)
XVII. Promissory notes and checks. (§§ 320–325.)
XVIII. Notes given for a patent rights and for a speculative consideration. (§§ 330–332.)
XIX. Laws repealed, when to take effect. (§§ 340, 341.)

* This is the General Title proposed by the Commissioners on Uniformity of Laws, and used in many of the States. It has been held sufficiently comprehensive under a constitutional provision providing that no law shall embrace more than one subject to be expressed in the title. Gilley *v.* Harrell (Tenn.), 101 S. W. Rep. 424.

ARTICLE I.

General Provisions.

Section 1. Short title.
2. Definitions and meaning of terms.
3. Person primarily liable on instrument.
4. Reasonable time, what constitutes.
5. Time, how computed; when last day falls on holiday.
6. Application of chapter.
7. Rule of law merchant; when governs.

Section 1. Short title.— This act shall be known as the negotiable instruments law (*a*).

(*a*) The law is confined to negotiable instruments. No attempt is made to deal with instruments which are non-negotiable; and they are not governed by the statute. In determining whether the rules of the statute will apply to any particular instrument, it is first necessary to ascertain whether such instrument is negotiable, according to the terms of the statute. In many instances the rules will be the same for instruments of either kind; but that is not because instruments which are non-negotiable are governed by the statute, but because the statute is a codification of common law rules which before its adoption applied equally to both classes of instruments. In other words, a negotiable instrument is governed by the statute and a non-negotiable instrument by the rules of the common law, though frequently these rules will be the same. For example, if a note drawn payable at a bank contains terms which render it non-negotiable, the provision of section 87, that "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon," would not apply; but the case would be governed by the rule of the common law, which is the same as the statutory rule in some of the States, but dif-

ferent in others. This distinction must be carefully borne in mind, or much confusion will result.

In a case arising under the laws of another State the court will not take judicial notice that the Negotiable Instruments Law has been enacted in that State; but, in the absence of evidence on the subject, will presume that the law of such State is the same as the common law before the enactment. Demelman *v.* Brazier, 193 Mass. 589. In construing the Act, however, the courts will notice the fact that its adoption was the result of an effort to bring about a uniform system of law respecting negotiable instruments. Rockfield *v.* First Nat. Bank of Springfield (Ohio) 83 N. E. Rep. 392; Downey *v.* O'Keefe, 26 R. I. 571; Thorpe *v.* White, 188 Mass. 333; Toole *v.* Crafts, 193 Mass. 110; Gibbs *v.* Guaraglia (N. J.) 67 Atl. Rep. 81; Baumeister *v.* Kuntz (Fla.) 42 South. Rep. 886; Farquahar Co. *v.* Higham (N. D.) 112 N. W. Rep. 557; Vander Ploeg *v.* Van Zuuk (Iowa) 112 N. W. Rep. 807. In Baltimore & Ohio R. R. Co. *v.* First National Bank of Alexandria (102 Va. 757, 758), it was said: "This opinion might be greatly prolonged by the citation of conflicting cases, and a discussion of the discordant views entertained by courts and text-writers of the greatest ability upon these questions; but the object, as we understand it, of the codification of the law with respect to negotiable instruments was to relieve the courts of this duty, and to render certain and unambiguous that which had theretofore been doubtful and obscure, so that the business of the commercial world, largely transacted through the agency of negotiable paper, might be conducted in obedience to a written law emanating from a source whose authority admits of no question."

§ 2. **Definitions and meaning of terms.**—In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

§ 3. **Person primarily liable on instrument.**— The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable (*a*).

(*a*) This section is to be construed in connection with section 37, which provides that "no person is liable on the instrument whose signature does not appear thereon;" and also with section 211, which provides that "the drawee is not liable on the bill unless and until he accepts the same;" and with section 325, which provides that "the bank is not liable to the holder unless and until it accepts or certifies the check." These are not, by the terms of the instrument, absolutely required to pay the same until such acceptance or certification. In Rouse *v.* Wooten (140 N. C. 557, 558) it was said: "A surety comes squarely within the definition of a person whose liability is primary, for he is by the terms of the instrument absolutely required to pay the same." But obviously this would not be so in the case of one signing as

"guarantor," since he is liable only where there is default by the party whose obligation he has guaranteed.

§ 4. **Reasonable time, what constitutes.**— In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case (*a*).

(*a*) Where the facts are doubtful or disputed, the question of reasonable time is a mixed question of law and fact. But when the facts are clear and undisputed, the question is one of law for the court. Commercial Nat. Bank *v.* Zimmerman, 185 N. Y. 310; German Am. Bank *v.* Mills, 99 App. Div. (N. Y.) 312; Prescott Bank *v.* Coverly, 7 Gray, 217; Gilmore *v.* Wilbur, 12 Pick. 124; Holbrook *v.* Burt, 22 Pick. 555; Northwestern Coal Co. *v.* Bowman, 69 Iowa, 153; Aymar *v.* Beers, 7 Cow. 705; Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 273. See note to section 131.

§ 5. **Time, how computed; when last day falls on holiday.** — Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day (*a*).

(*a*) As to the mode of computing time, see the New York Statutory Construction Law (§§ 26, 27).

§ 6. **Application of chapter.**— The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof (*a*).

(*a*) The time when the statute was to take effect is provided for by section 341. In New York this was October 1st, 1897. But while the law did not go into effect until then, its application is not limited to instruments made after that date. An instrument made and delivered after the passage of the act was equally within its operation after October 1st. For example, if a note payable four months after date was dated and delivered on July 15th, 1897, it must, at maturity, have been presented for payment in the manner prescribed by the statute; and if dishonored, the

statutory rules as to giving notice of dishonor must have been complied with. But in the case of a note dated and delivered April 15th, 1897, and payable six months after date, none of the provisions of the statute apply.

§ 7. **Law merchant; when governs.**— In any case not provided for in this act the rules of the law merchant shall govern (*a*).

(*a*) It is to be observed that the rules governing in such cases are not those which existed by virtue of a statute. All prior statutes upon the subject of bills and notes are repealed; and where a case arises which is not provided for in the Negotiable Instruments Law, it is not to be determined by resort to any of the former statutes, but by reference to the rules of the law merchant. As to the presumption concerning the law of another State, see Demelman *v.* Brazier, 193 Mass. 588. In the late case of Columbian Banking Co. *v.* Bowen (114 N. W. Rep. 451) it was said by the Supreme Court of Wisconsin: "Counsel for appellant have presented quite an extended argument, referring to many authorities, as to the law antedating and independently of the negotiable instrument statute (chapter 356, p. 681, Laws 1899) to support the proposition, that appellant was released from liability on the instrument in question, because of the period intervening between his parting therewith and the presentation thereof to the drawee for payment. Such statute was enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper, and, therefore, so far as it speaks without ambiguity as to any such question, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading. The negotiable instrument law is not merely a legislative codification of judicial rules previously existing in this state making that written law, which was before unwritten. It is, so far as it goes, an incorporation into written law of the common-law of the state, so to speak, the law-merchant generally as recognized here, with such changes or modifications and additions as to make a system harmonizing, so far as practicable, with that prevailing in other states. That it contains some quite material changes in previous rules governing commercial paper we have had occasion heretofore to point out. Hodge *v.* Smith, 130 Wis. 326; Aukland *v.* Arnold (Wis.) 111 N. W. Rep. 212."

ARTICLE II.

FORM AND INTERPRETATION.

Section 20. Form of negotiable instrument.
21. Certainty as to sum; what constitutes.
22. When promise is unconditional.
23. Determinable future time; what constitutes.
24. Additional provisions not affecting negotiability.
25. Omissions; seal; particular money.
26. When payable on demand.
27. When payable to order.
28. When payable to bearer.
29. Terms when sufficient.
30. Date, presumption as to.
31. Ante-dated and post-dated.
32. When date may be inserted.
33. Blanks, when may be filled.
34. Incomplete instrument not delivered.
35. Delivery; when effectual; when presumed.
36. Construction where instrument is ambiguous.
37. Liability of person signing in trade or assumed name.
38. Signature by agent; authority; how shown.
39. Liability of person signing as agent, et cetera.
40. Signature by procuration; effect of.
41. Effect of indorsement by infant or corporation.
42. Forged signature; effect of.

§ 20. **Form of negotiable instrument.**—An instrument to be negotiable must conform to the following requirements:

1. It must be in writing (*a*) and signed by the maker or drawer.

2. Must contain an unconditional promise (*b*) or order to pay a sum certain in money (*c*);

3. Must be payable on demand (*d*), or at a fixed or determinable future time (*e*);

4. Must be payable to order (*f*) or to bearer (*g*); and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty (*h*).

(*a*) The writing may be in pencil. Brown *v.* Butchers' Bank, 6 Hill, 443.

(*b*) See section 22.

(*c*) This is the rule of the law merchant, and the rule which prevails in most of the States. In some States — as, for example, in Georgia — certain instruments are declared by statute to be negotiable, though they provide that payment is to be made in goods or merchandise. See also section 25, subdivision 5. In New York warehouse receipts issued by certain corporations are declared to be negotiable. See Hanover Nat. Bank *v.* American Dock and Trust Co., 148 N. Y. 612; Corn Exchange Bank *v.* Same, 149 N. Y. 174. The act does not repeal these statutes. An instrument which, by its true construction, is an unconditional order to pay a certain sum of money at a fixed future time, to the payee or order, is a bill of exchange under the terms of the statute. Torpey *v.* Tebo, 184 Mass. 307.

(*d*) See section 26.

(*e*) See section 23.

(*f*) See section 27. The North Carolina Act reads: "Must be payable to the order of a specified person or bearer." The words "specified person" are surplusage, since by section 27 this is declared to be the effect of the term "order."

(*g*) Yingling *v.* Kohlhass, 18 Md. 148; Curtis *v.* Hazen, 56 Conn. 146. If the instrument is payable to a particular person, and not to his order or to bearer, it is not negotiable. Backus *v.* Danforth, 10 Conn. 297. As to bonds payable to bearer and coupons, see Carr. *v.* Leferre, 27 Pa. St. 413; County of Beaver *v.* Armstrong, 44 Pa. St. 63; National Exchange Bank *v.* Hartford, etc., R. R. Co., 8 R. I. 375. As to Treasury notes, see Frazer *v.* D'Quilliers, 2 Pa. St. 200. See section 28. An instrument which is not payable to order or bearer is not within the terms of the statute.

Westberg *v.* Chicago L. & C. Co., 117 Wis. 589. In Tennessee the Act has repealed Shannon's Code, § 3506, providing that every note, whether payable to order or not, should be negotiable in the same manner as promissory notes. Gilley *v.* Harrell (Tenn.), 101 S. W. Rep. 424.

(*h*) See section 215.

§ 21. **Certainty as to sum; what constitutes.**— The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or

2. By stated instalments (*a*); or

3. By stated instalments, with a provision that upon default in payment of any instalment or of interest (*b*), the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate (*c*); or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity (*d*).

(*a*) Markey *v.* Corey, 108 Mich. 184; Wright *v.* Irwin, 33 Mich. 32. In this case the note was for $1500, to be paid twenty per cent. a month from the 1st of July, 1871.

(*b*) For a case arising under the provisions of the Wisconsin Act, see Hodge *v.* Wallace, 129 Wis. 84.

(*c*) Second National Bank of Aurora *v.* Basuier, 65 Fed. Rep. 58; Hastings *v.* Thompson, 54 Minn. 184; Flagg *v.* School District, 4 N. D. 30; Whittle *v.* Fond du Lac National Bank (Tex.) 26 S. W. Rep. 1106. *Contra,* Culbertson *v.* Nelson, 93 Iowa 187.

(*d*) As to this point there has been much conflict in the decisions. The rule adopted in the Act is the one sustained by the weight of authority. It is supported by National Bank *v.* Sutton Mfg. Co., 6 U. S. App. 312, 331; Oppenheimer *v.* Farmers and Merchants' Bank, 97 Tenn. 19; Montgomery *v.* Crossthwait, 90 Ala. 553; Trader *v.* Chichester, 41 Ark. 242; Stapleton *v.* Louisville Banking Co., 95 Ga. 802; Dorsey *v.* Wolff, 142 Ill. 589; Stoneman *v.* Pyle, 35 Ind. 103; Shenandoah Nat. Bank *v.* Marsh, 89 Iowa 273; Benn *v.* Kutzschan, 24 Oregon 28; Seaton *v.* Scoville, 18 Kans. 433; Dietrich *v.* Boylie, 23 La. Ann. 767;

Second National Bank *v.* Anglin, 6 Wash. 403; Heard *v.* Dubuque Bank, 8 Neb. 10; Stark *v.* Olsen, 44 Neb. 646. The courts which have sustained this rule have taken the view that so long as the amount payable is certain up to the time of maturity and dishonor, it is not essential that after that time, when the instrument has become non-negotiable for other reasons, the certainty as to the amount should continue. In the Tennessee case above cited the court said: "Upon a careful review of the authorities, we can perceive no reason why a note otherwise imbued with all the attributes of negotiability is rendered non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whom the action was rendered necessary, and the expense entailed." The statute has changed the law in Maryland (Maryland Fertilizing Co. *v.* Newman, 60 Md. 584); North Carolina (First National Bank *v.* Bynum, 84 N. C. 24); Pennsylvania (Woods *v.* North, 84 Pa. St. 407). See also Jones *v.* Rodetz, 27 Minn. 240; First Nat. Bank *v.* Gay, 63 Mo. 38; First Nat. Bank *v.* Larsen, 60 Wis. 206; Morgan *v.* Edwards, 53 Wis. 599; Sylvester Bleckley Co. *v.* Alewine, 48 S. C. 308. The question does not appear to have been passed upon by the New York courts. In some States a stipulation to pay a specified percentage as an attorney's fee is void. Levens *v.* Briggs, 21 Oregon 333. The statute, probably, does not change the law of these States, since it does not attempt to validate such provisions, but merely declares that their presence in the instrument shall not affect its negotiable quality.

§ 22. **When promise is unconditional.**—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; (*a*) or

2. A statement of the transaction which gives rise to the instrument (*b*).

But an order or promises* to pay out of a particular fund is not unconditional (*c*).

(*a*) The mere mention of a fund in a draft does not necessarily deprive it of the character of commercial paper, but it must further appear, in order to have such effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise. Schmittler *v.* Simon, 101 N. Y. 554, 560. In the case cited, a draft drawn upon an executor contained the words, "and charge the amount against me and of my mother's estate." It was held that the reference to the estate was not a direction to pay out of it, but that the estate was referred to simply as a means of reimbursement. So, in Macleod *v.* Luce, 2 Stra. 762; 2 Ld. Raym. 1481, where the instrument contained the words, "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance," the court said, "The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person;" and the court accordingly held the instrument to be a bill of exchange. Likewise, in Redman *v.* Adams, 51 Me. 433, where the drawer added, "and charge the same against whatever amount may be due me for my share of fish," it was held that these words were a mere indication of the means of reimbursement, and did not destroy the negotiable character of the draft. And a similar ruling was made in Whitney *v.* Eliot National Bank, 137 Mass. 351, where the directions were, "charge the same to account of 250 bbls. meal exschooner "Aurora Borealis." See also Nichols *v.* Ruggles, 76 Me. 27. The test is whether the drawee is confined to the particular fund, or whether, though a specified fund is mentioned, he could have the power to charge the bill up to the general account of the drawer, if the designated fund should turn out to be insufficient. Munger *v.* Shannon, 61 N. Y. 251, 255. A draft in the following form: "Pay to the order of the First National Bank of Hutchinson, Kansas, $1,500 on account of contract between you and the Snyder Plaining Mill Company" was held negotiable, the words "on account of," etc., being deemed an indication of the fund to which the drawee was to look for reimbursement, and not a direction to charge a particular fund. First Nat. Bank of Hutchinson *v.* Lightner, 74 Kans. 736.

(*b*) For example, a note expressed to be in payment of certain

* Error in engrossing.

tracts of land is negotiable. First Nat. Bank *v.* Michael, 96 N. C. 53. The most frequent instances of this sort are notes given in payment of the purchase price of goods and chattels. Thus, in Chicago Railway Equipment Co. *v.* Merchants' Nat. Bank, 136 U. S. 268, it was held that the negotiable character of a promissory note was not affected by a provision that it was given with others in payment for certain cars, the title to which should remain in the payee until all the notes of the series should be paid. The court said: "The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. The agreement, by which the vendor retains the title and by which the notes are secured on the cars, is collateral to the notes, and does not affect their negotiability. It does not qualify the promise to pay at the time fixed, any more than would be done by an agreement of the same kind, embodied in a separate instrument, in the form of a mortgage." So, in Mott *v.* Havana Nat. Bank, 22 Hun, 354, a like ruling was made with respect to a provision in a note that it was to be "in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is paid." So, where there was a similar recital as to the title of a piano, for the price of which the note was given. Third Nat. Bank *v.* Bowman, 50 App. Div. (N. Y.) 66. And so, where there was a recital in the note that it was "given in consideration of a certain patent right." Hereth *v.* Meyer, 33 Ind. 511. But see section 330.

(*c*) An order on a savings bank, "Pay C, or order, three hundred dollars, or what may be due on my deposit book No. E, page 632," is payable out of a particular fund, and therefore not negotiable under the statute. National Savings Bank *v.* Cable, 73 Conn. 568. See also, Lowery *v.* Steward, 25 N. Y. 239; Munger *v.* Shannon, 61 N. Y. 251; Parker *v.* City of Syracuse, 31 N. Y. 376; Morton *v.* Naylor, 1 Hill, 583; Gawken *v.* De Loraine, 3 Wils. 207. In the case first cited the order was: "Please pay to the order of Archibald H. Lowery the sum of $500 on account of twenty-four bales of cotton shipped to you as per bill of lading, by steamer Colorado, inclosed to you in letter." It was held that this was not a bill of exchange, requiring acceptance to bind the drawers, but a specific draft or order upon a particular fund. The language of the statute payable "out of a particular fund" is the equiva-

lent of the expression found in many of the cases "drawn on the general credit of the drawer." Hibbs *v.* Brown, 190 N. Y. 167, 175. A clause in the trust deed securing payment of an issue of bonds provided that, "No present or future shareholder, officer, manager or trustee of the Express Company shall be personally liable as partner or otherwise in respect of this bond or the coupons appertaining thereto, but the same shall be payable solely out of the assets assigned and transferred to the said Trust Company or out of other assets of the Express Company:"—*Held,* that while a joint stock association differs from a corporation and is like a partnership in respect to the individual liability of its members, the association issuing the bonds must be regarded as a joint, *quasi* corporate entity; that the bonds having been issued in its name, upon its general credit and binding all its assets, complied with the requirements for a negotiable instrument, even though the practically unimportant individual liability of members was excluded; that such exclusion did not constitute the general assets, out of which the bonds were payable, a particular fund within the meaning of this section. (Id.)

§ 23. **Determinable future time; what constitutes.**—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; (*a*) or

2. On or before a fixed or determinable future time specified therein; (*b*) or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain (*c*).

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect (*d*).

(*a*) A draft was drawn as follows: "Mr. Wm. Tebo. Will please pay to R. J. Torpey or order two hundred and fifty dollars and charge to my account. Due Oct. 1. John Ryan:"—*Held,* that the words "due Oct. 1," were to be construed as payable October 1st, and hence that the instrument was negotiable. Torpey *v.* Tebo, 184 Mass. 307.

(*b*) In such a case the legal rights of a holder are clear and certain; the note is due at a time fixed, and it is not due before. The option of the maker, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. See Mattison *v.* Marks, 31 Mich. 421; Smith *v.* Ellis, 29 Me. 422; Buchanan *v.* Wren (Tex.) 30 S. W. Rep. 1077; Riker *v.* Sprague Mfg. Co., 14 R. I. 402; Kiskadden *v.* Allen, 7 Colorado 206; Jordan *v.* Tate, 19 Ohio St. 586; Albertson *v.* Laughlin, 173 Pa. St. 525. Thus, where the note was made payable twelve months after date, or before, if the money was made out of the sale of a machine, it was held to be negotiable. Ernst *v.* Steckman, 74 Pa. St. 13. So, in Ackley School District *v.* Hall, 113 U. S. 135, 140, it was held that municipal bonds, issued under a statute providing that they should be payable at the pleasure of the district at any time before due, were negotiable. The court said: "By their terms, they were payable at a time which must certainly arrive; the holder could not exact payment before the day fixed in the bonds; the debtor incurred no legal liability for nonpayment until that day passed." In the Wisconsin act, the words "though payable before then on a contingency" are added. For a case applying the Wisconsin statute, see Thorp *v.* Mindeman, 123 Wis. 149.

(*c*) Thus, a note payable a certain number of days after the death of the maker, or upon demand after the death of the maker, is a good promissory note, because the event is sure to happen. Carnwright *v.* Gray, 127 N. Y. 92; Hegeman *v.* Moon, 131 N. Y. 462. See also Shaw *v.* Camp, 160 Ill. 425; Martin *v.* Stone, 67 N. H. 367; Price *v.* Jones, 105 Ind. 544; Bristol *v.* Warner, 19 Conn. 74. But an instrument payable when, or in so many days after, "A shall become of age," would not be negotiable, because it is uncertain whether A will live so long. Goss *v.* Nelson, 1 Burr, 226; Rice *v.* Rice, 43 App. Div. (N. Y.) 458. So, a note payable "when A shall marry," Peason *v.* Garrett, 4 Mod. 242; or when a certain ship shall arrive. Coolidge *v.* Ruggles, 15 Mass. 387; Grant *v.* Wood, 12 Gray, 220.

(*d*) Duffield *v.* Johnston, 95 N. Y. 369; First National Bank *v.* Alton, 60 Conn. 402. Thus, where an instrument is made payable when a certain person shall become of age, the fact that he actually attains his majority does not make the instrument negotiable. Goss *v.* Nelson, 1 Burr, 226. But a stipulation on the face of the paper that the sureties consent to an extension of time for pay-

ment without notice does not destroy the negotiable quality of the instrument. Farmer *v.* Bank of Graettinger, 130 Iowa 469. *Contra,* Union Stockyards Nat. Bank *v.* Bolan (Idaho) 93 Pac. Rep. 509.

§ 24. Additional provisions not affecting negotiability.— An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity (*a*); or

2. Authorizes a confession of judgment if the instrument be not paid at maturity (*b*); or

3. Waives the benefit of any law intended for the advantage or protection of the obligor (*c*); or

4. Gives the holder an election to require something to be done in lieu of payment of money (*d*).

But nothing in this section shall validate any provision or stipulation otherwise illegal (*e*).

(*a*) Collateral notes are often non-negotiable because of some provision therein in regard to the time of payment, or because of provisions requiring something to be done in addition to the payment of money. But a statement that collateral security has been deposited for the performance of the promise contained in the note is a recital only which does not affect its negotiability. Wise *v.* Charlton, 4 A. & E. 486; Fancourt *v.* Thorne, 9 Q. B. 312. And a provision merely authorizing the sale of the collateral, if the note be dishonored, does not have this effect. Perry *v.* Bigelow, 128 Mass. 129; Towne *v.* Rice, 122 Mass. 67; Biegler *v.* Merchants' Loan & Trust Co., 62 Ill. App. 560; Arnold *v.* Rock River Valley Union R. R. Co., 5 Duer, 207. A statement, however, that the note is "given as collateral security with agreement" destroys its negotiable character. Costello *v.* Crowell, 127 Mass. 293.

(*b*) This provision was inserted in the act to meet the requirements in some of the States where judgment notes are in use. Such notes are not known in New York. In Pennsylvania it was held that the warrant of attorney rendered the note non-negotiable.

Overton *v.* Tyler, 3 Pa. St. 346; Sweeney *v.* Thickstum, 77 Pa. St. 131. A note which authorizes a confession of judgment at any time after its date, whether due or not, is not negotiable under the statute; for as the time of payment will thus depend upon the whim or caprice of the holder, it is absolutely uncertain. Wisconsin Yearly Meeting of Freewill Baptists *v.* Barber, 115 Wis. 289.

(*c*) In some of the States it is a common practice to insert in promissory notes a waiver of the benefits of homestead and exemption laws, and this provision of the act is designed to meet such cases. See Zimmerman *v.* Anderson, 67 Pa. St. 421; Zimmerman *v.* Rote, 75 Pa. St. 188.

(*d*) An illustration of this case is the right of the holder to elect to take stock of a corporation in lieu of payment in money. Hodges *v.* Shuler, 22 N. Y. 114. As the obligation of the maker is to pay in money, and as the payment in stock is not optional with him, the note is not within the rule that a negotiable instrument must not be payable in the alternative.—*Id.*

(*e*) The object of this provision is to prevent any inference of an intent to validate any agreement or stipulation mentioned in the section, where, by any statute or settled policy of the State, the same would be illegal. In the Wisconsin Act the following words are added: "or authorize the waiver of exemptions from execution."

§ 25. Omissions; seal; particular money.— The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated (*a*); or

2. Does not specify the value given, or that any value has been given therefor (*b*); or

3. Does not specify the place where it is drawn or the place where it is payable (*c*); or

4. Bears a seal (*d*); or

5. Designates a particular kind of current money in which payment is to be made (*e*).

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument (*f*).

(*a*) Church *v.* Stevens, 107 N. Y. Supp. 310. See section 36, which provides that "where the instrument is not dated, it will be considered to be dated as of the time it was issued." As between the immediate parties parol evidence is admissible to show the true date of a misdated note. Bigge *v.* Piper, 86 Tenn. 589.

(*b*) This was the general rule at common law. Daniel on Negotiable Instruments, § 108. But formerly in Connecticut a promissory note, not purporting on its face to be for value received did not import a consideration. Edgerton *v.* Edgerton, 8 Conn. 6; Bristol *v.* Warner, 19 Conn. 7.

(*c*) See sections 22, 54, 137.

(*d*) Prior to the statute the Court of Appeals of New York held that the commercial paper of a corporation did not lose the quality of negotiability by having attached thereto the corporate seal. Chase Nat. Bank *v.* Faurot, 149 N. Y. 532; Weeks *v.* Esler, 143 N. Y. 374. See also Mackay *v.* St. Mary's Church, 15 R. I. 121. The same rule had been applied to municipal bonds under seal. Bank of Rome *v.* Village of Rome, 19 N. Y. 20; Mercer County *v.* Hacket, 1 Wall. 83. And to the bonds of private corporations. Brainard *v.* N. Y. & H. R. R. Co., 25 N. Y. 496. So it was held that the negotiability of a United States treasury note was not restrained or affected by the fact that it was under the treasury seal. Dinsmore *v.* Duncan, 57 N. Y. 573. In Mercer County *v.* Hacket, *supra*, it was said by Justice Geier, speaking of bonds issued under seal: "But there is nothing immoral or contrary to good policy in making them negotiable if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or issuing any species of security not known in the last century." See also Mason *v.* Frick, 105 Pa. St. 162 and cases cited; Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 699; National Exchange Bank *v.* Hartford P. & F. R. Co., 8 R. I. 375; Jackson *v.* Myers, 43 Md. 452; Muth *v.* Dolfield, 43 Md. 466. *Contra*, Osborne *v.* Hubbard, 20 Oregon 318. The rule adopted in the act existed by statute in the following States: Colorado, Florida, Georgia, Illinois, Kansas, Massachusetts, Nebraska, North Carolina, Ohio, and Tennessee.

(*e*) Thus, a note payable in gold coin is negotiable. Chrysler *v.* Griswold, 43 N. Y. 209. So is a note payable "in bank notes current in the city of New York." Keith *v.* Jones, 9 Johns. 120.

A note payable "in New York State bills or specie." Judah *v.* Harris, 19 Johns. 144. And a note payable "in current Florida funds." Williams *v.* Moseley, 2 Fla. 304. But see Wright *v.* Hart's Admr., 44 Pa. St. 454, where it was held that a note payable "in current funds at Pittsburgh" was not negotiable. See also Ford *v.* Mitchell, 15 Wis. 304; Platt *v.* The Sauk County Bank, 17 Wis. 222; Lindsey *v.* McClelland, 18 Wis. 481; Klauber *v.* Biggerstoff, 47 Wis. 551.

(*f*) In a number of the States it is required that notes given in payment of patent rights shall have written on the face thereof "given for a patent right." So, there are statutes requiring that what are known as "Bohemian oats" notes shall state the nature of the consideration for which they were given. And so, there are statutes which require this in the case of notes given in payment for lightning rods or stallions, or notes given to "peddlers." The above provision is intended to prevent any repeal of such statutes. The New York statutes on the subject have been incorporated into the act. See sections 330, 331.

§ 26. **When payable on demand.**—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight (*a*), or on presentation; or

2. In which no time for payment is expressed (*b*).

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand (*c*).

(*a*) By the law merchant there are some distinctions between instruments payable on demand and those payable at sight; as, for example, in the matter of days of grace. See Daniel on Negotiable Instruments, §§ 617-619, and authorities there cited. This was also the effect of former statutes in some of the States. Walsh *v.* Dart, 12 Wis. 635. The new statute abolishes all these distinctions.

(*b*) Messmore *v.* Morrison, 172 Pa. St. 300; Hall *v.* Toby, 110 Pa. St. 318; James *v.* Brown, 11 Ohio St. 601; Holmes *v.* West, 17 Cal. 623; Porter *v.* Porter, 51 Me. 376; Keyes *v.* Feustomaher, 24 Cal. 329; Bank *v.* Price, 52 Iowa 530; Libby *v.* Mekelborg, 28

Minn. 38; Roberts *v.* Snow, 28 Neb. 425; Bacon *v.* Page, 1 Conn. 405; Raymond *v.* Sellick, 10 Conn. 485; Dodd *v.* Denny, 6 Oregon 156. And the legal intendment that the instrument is payable on demand cannot be changed by parol proof. Roberts *v.* Snow, 28 Neb. 425; Thompson *v.* Ketcham, 8 Johns. 146; Sheldon *v.* Heaton, 88 Hun, 535; Gaylord *v.* Van Loan, 15 Wend. 308; McLeod *v.* Hunter, 29 Misc. N. Y. 558 (a case arising under the statute); Koehning *v.* Muemminghoff, 61 Mo. 403; Self *v.* King, 28 Tex. 552. The words "on demand" may be added without avoiding the instrument. Byles on Bills, 210.

(*c*) Berry *v.* Robinson, 9 Johns. 121; Leavitt *v.* Putnam, 1 Sandf. 199; Bassonhorst *v.* Wilby, 45 Ohio St. 336; Light *v.* Kingsbury, 50 Mo. 331; Smith *v.* Caro, 9 Oregon 280; Bemis *v.* McKenzie, 13 Fla. 553. It is commonly said that the indorsement of a bill or note which is overdue is equivalent to drawing a new instrument payable at sight. Bishop *v.* Dexter, 2 Conn. 419; Mudd *v.* Harper, 1 Md. 110. In such cases presentment for payment must be made and notice of dishonor given, as in other instances of instruments payable on demand. Berry *v.* Robinson, 9 Johns. 121; Van Hoosen *v.* Van Alstyne, 9 Wend. 79; Poole *v.* Tolleson, 1 McCord, 200; Patterson *v.* Todd, 18 Pa. St. 420; Rosson *v.* Carroll, 90 Tenn. 90; Brown *v.* Hull, 33 Gratt. 23. Where a note, negotiated before due, is further negotiated after it has been dishonored, the holder takes the legal title, and can maintain a suit upon it in his own name, in the same manner as if he had received it before it was due. French *v.* Jarvis, 29 Conn. 353.

§ 27. **When payable to order.**— The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order (*a*). It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker (*b*); or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees (*c*); or
6. The holder of an office for the time being (*d*).

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty (*e*).

(*a*) By the rules of the law merchant an instrument payable to a specified person without the addition of the word "order," or other word of similar import, was not negotiable. Byles on Bills, p. 83; Smith *v.* Kendall, 6 T. R. 123; Maule *v.* Crawford, 14 Hun, 193; Carnwright *v.* Gray, 127 N. Y. 92. The English Bills of Exchange Act provides that "a bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable." But this change in the law was not deemed advantageous, and was not adopted.

(*b*) A note payable to the order of the maker is not complete until indorsed by him. Section 320.

(*c*) Illustration: A draft payable to A, B, and C, or either of them, or any two of them.

(*d*) For example, a note payable to three persons as trustees of an incorporated association, *or their successors in office,* is negotiable. Davis *v.* Gore, 6 N. Y. 124.

(*e*) The payee need not be designated by name. If his identity can be ascertained with certainty, it is sufficient. United States *v.* White, 2 Hill, 59; Blackman *v.* Lehman, 63 Ala. 547.

§ 28. **When payable to bearer.**— The instrument is payable to bearer:

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer (*a*); or

3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable (*b*); or

4. When the name of the payee does not purport to be the name of any person (*c*); or

5. When the only or last indorsement is an indorsement in blank (*d*).

(*a*) Illustration: Instrument payable to "A. B., or bearer." In such case it is negotiable by delivery, and the indorsement of A. B. is not necessary to pass the title therein. See section 60.

(*b*) It is essential that the fictitious character of the payee should be known to the person making the instrument so payable. As said by the Court of Appeals of New York, in Shipman *v.* Bank of the State of New York, 126 N. Y. 318, "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." Hence, if the maker or drawer supposes the payee to be an actually existing person (as, for instance, where he is induced by fraud to draw the instrument to the order of a fictitious person whom he supposes to exist), the instrument will not be payable to bearer, and no person can acquire the title thereto by delivery. And where the instrument is drawn, payable at a bank, the bank cannot charge the same to the account of its customer, since the instrument is not in such case payable to bearer, and the indorsement is a forgery. Shipman *v.* Bank of the State of New York, *supra;* Armstrong *v.* Bank, 46 Ohio St. 412; Bank of England *v.* Vagliano [1891], App. Cas. 107. But see Clutton *v.* Attenborough [1895], 2 Q. B. 707. It has been held that a note made payable to the order of the estate of a deceased person is a promissory note with a fictitious payee, and that where it has been negotiated by the maker it is deemed as against him to be a note payable to bearer. Lewisohn *v.* The Kent & Stanley Co., 87 Hun, 257. But the correctness of this view seems very questionable. The ground of the rule is that, as the fictitious payee cannot indorse the instrument, the drawer or maker must have intended that it should be payable to bearer. But no such intention can properly be ascribed where the instrument is drawn payable to the order of an estate; for the obvious intention is that it shall be paid upon the order of the decedent's legal representatives, and that they shall indorse the paper. Checks are frequently drawn in this way, and it appears to be the understanding of the business community that they require the indorsement of the executor or administrator.

(*c*) For example, a check payable to "cash" or to "sundries." See Willets *v.* Phœnix Bank, 2 Duer, 121; Mechanics' Bank *v.* Stratton, 2 Keyes, 365.

(*d*) If the maker of a promissory note wrongfully obtains possession of it after it has been indorsed in blank by the payee, he is the bearer within the meaning of the statute. Massachusetts National Bank *v.* Snow, 187 Mass. 159.

§ 29. **Terms when sufficient.**—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof (*a*).

(*a*) It may be written in a foreign language as well as in English. Debebian *v.* Gala, 64 Md. 262, 265. The writing may be in pencil as well as in ink. Brown *v.* Butchers' Bank, 6 Hill, 443. As to the construction of ambiguous instruments, see section 36.

§ 30. **Date, presumption as to.**—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be (*a*).

(*a*) But evidence is admissible, as between the immediate parties, to show a mistake in the date. Cowing *v.* Altman, 71 N. Y. 441. If the date is an impossible one, the law will adopt the nearest day. Thus, if the date is written September 31st, the true date will be deemed to be September 30th. Wagner *v.* Kenner, 2 Rob. (La.) 120.

§ 31. **Ante-dated and post-dated.**— The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery (*a*).

(*a*) A post-dated bill or check may be negotiated before the day of its date. Brewster *v.* McCardle, 8 Wend. 478; Pasmore *v.*

North, 13 East, 517. In the case last cited the payee who had negotiated a post-dated bill died the day before the day of date; but it was held that the indorsee had derived title through such payee, and could recover of the drawer. If for the purpose of evading the law, a false date is inserted in the instrument, it will be void as to all persons having notice. Serle *v.* Norton, 9 M. & W. 309.

§ 32. **When date may be inserted.**— Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly (*a*). The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date (*b*).

(*a*) See next section.

(*b*) Redlich *v.* Doll, 54 N. Y. 238; Page *v.* Monell, 3 Abb. Ct. App. Dec. 433; Mitchell *v.* Culver, 7 Cow. 336.

§ 33. **Blanks; when may be filled.**— Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein (*a*). And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount (*b*). In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course (*c*), it is valid and effectual for all purposes

in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time (*d*).

(*a*) The leading authority upon this point is Russell *v.* Langstaffe, 2 Doug. 514. In that case a person had indorsed his name on five copperplate checks, blank as to amounts, dates and times of payment, and the holder, Galley, filled them up as his own notes with different dates, amounts and times of payment. The indorser was held liable to the plaintiff, who had discounted them. Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said: 'Trust Galley for any amount, and I will be his security.' It does not lie in his mouth to say the indorsement was not regular." See also Ovrick *v.* Colston, 7 Gratt. 189; Frank *v.* Lilienfeld, 33 Gratt. 377; Boyd *v.* McCann, 10 Md. 118; Elliot *v.* Chestnut, 30 Md. 562; Androscoggin Bank *v.* Kimball, 10 Cush. 373. If the place for the name of the payee is left blank the holder may fill it up with his own name as payee. Boyd *v.* McCann, 10 Md. 118. But it will be noticed that the authority is only to *complete* the instrument, for while there is an authority to fill up blanks in order to make the instrument complete as such, there is no authority to insert a special agreement not essential to the completeness of the instrument. Weyerhauser *v.* Dunn, 100 N. Y. 150. It will also be noticed that, except where the paper has been negotiated to a holder in due course, the presumption of authority is not absolute, but only *prima facie*. Where the amount is stated in figures in the margin, and a blank space is left for the amount in the body, of the instrument, it is not complete until the blank is filled up. Chestnut *v.* Chestnut, 104 Va. 539; Hallen *v.* Davis, 59 Iowa, 444; Norwich Bank *v.* Hyde, 13 Conn. 281; Schreyer *v.* Hawkes, 22 Ohio St., 308, 315; Garrard *v.* Lewis, L. R. 10 Q. B. Div. 30.

(*b*) It is to be observed that this rule applies only where the incomplete instrument has been *delivered*. See next section.

(*c*) As the statute applies only to a person to whom the instrument has been *negotiated*, a payee, to whom paper is delivered after it has been filled up without authority, is not within the protection of this clause. Vander Ploeg *v.* Van Zunk (Iowa) 112 N. W. Rep. 807. In the case cited the defendants placed their

signatures on a blank printed form at the request of P, who was a partner of one of them in a mercantile business, on the representation that he might find it necessary to raise $150 or $200 for temporary use in the business. Afterwards P, being indebted on his individual account to the plaintiff, filled out the form for $2,000 payable to the order of the plaintiff, and delivered the same to the plaintiff without authority from the defendants:—*Held,* that the plaintiff could not be deemed a holder in due course, since he was a party to the original contract, and not a person to whom the paper had been *negotiated.* The court said: "It seems to us under these definitions and the application thereof the plaintiff was a holder of the note, but not a holder in due course. The latter term seems unquestionably to be used to indicate a person to whom after completion and delivery the instrument has been negotiated. In an ordinary case [the payee] is the person with whom the contract is made, and his rights are not in general dependent on any peculiarities in the law of negotiable instruments. The peculiarities of that law distinguishing negotiable instruments from other contracts relate to a holder who has taken by negotiation, and not as an original party." See also Guerrant *v.* Guerrant, 7 Va. Law Reg. 637; Herdman *v.* Wheeler, 1 K. B. (1902) 361.

(*d*) If the instrument be used, or the blanks filled up contrary to the agreement or intention of the original parties, the maker is held to any *bona fide* holder for value, upon the principle that where one or two innocent parties must suffer by the fraud or wrong of a third person the one who put it in the power of such third person to commit the fraud or wrong must bear the loss. The liability of the maker in such case has also, sometimes, been placed upon the principle of estoppel; he, having put his paper in circulation, and thus invited the public to receive it of any one having apparent title, is estopped to urge the actual defect of title against a *bona fide* holder. Redlich *v.* Doll, 54 N. Y. 234, 238. Where one makes and delivers a promissory note, perfect in form, except that a blank is left after the word "at" for the place of payment, there is an implied authority for any *bona fide* holder to fill the blank, and the insertion of a place of payment, and negotiation of the note, contrary to the agreement of the original parties, does not avoid it in the hands of a *bona fide* holder of value. (*Id.*) So, one who intrusts another with his blank acceptance is liable to a holder for value, though filled up for a sum

exceeding that limited by the acceptor. Van Duzer *v.* Howe, 21 N. Y. 531. But where the amount is left blank in the body of the note, and a sum is indicated in figures in the margin, the amount cannot be filled in for a larger sum than that so indicated. Norwich Bank *v.* Hyde, 13 Conn. 284.

§ 34. **Incomplete instrument not delivered.**— Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery (*a*).

(*a*) A negotiable instrument must be complete and perfect when it is issued, or there must be authority reposed in some one afterward to supply any thing needed to make it perfect. Sedgwick *v.* McKim, 53 N. Y. 307, 313; Davis Sewing Machine Co. *v.* Best, 105 N. Y. 59, 67. And mere negligence on the part of the person sought to be held liable will not be sufficient to entitle the holder to recover of him on the instrument. Baxendale *v.* Bennett, L. R. 3 Q. B. Div. 525. Thus, in the case cited, where a blank acceptance which had been given to one person and returned by him was afterward stolen from the acceptor and another person filled in his own name and negotiated the bill, it was held that there could be no recovery on such acceptance even by a *bona fide* holder for value. Barnwell, L. J., said: "The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime. But it is said that he had done so through negligence. I confess I think he has been negligent — that is to say, I think if he had had this paper from a third person as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion."

Where a promissory note is delivered by the maker to the payee, upon a verbal agreement that the instrument shall not take effect until other persons shall have signed, the paper will have no validity as between the original parties, unless so completed. Hodge *v.* Smith, 130 Wis. 326. If only part of such other signatures be obtained, the party first signing may defend on the ground that the instrument was never either completed or delivered, while the other parties may defend on the ground of fraud, even though

they themselves signed unconditionally, for the reason that the paper never took effect as to the conditional maker. (*Id.*)

A woman delivered to her husband a check signed by her and made payable to a certain creditor, but with the amount left blank, instructing her husband to apply it in payment of her debt, and the husband delivered it to the creditor with the blank unfilled, to be used as a payment upon a debt of his own to the same creditor, and allowed the creditor with his consent to fill in the blank with a certain amount as such payment:—*Held,* that the check was an incomplete instrument under this section, and that in an action brought by the creditor against the woman for her indebtedness to him, alleged to be unpaid, she could produce evidence to show that, by the authority actually given him, her husband had no right to treat the check as he did or to apply it otherwise than in payment of her debt. Boston Steel & Iron Co. *v.* Steuer, 183 Mass. 140.

§ 35. **Delivery; when effectual; when presumed.**— Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto (*a*). As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional (*b*), or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed (*c*). And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved (*d*).

(*a*) Like other written contracts, a bill of exchange or promissory note has no legal inception or valid existence as such until

it has been delivered in accordance with the purpose and intent of the parties. Burson *v.* Huntington, 21 Mich. 416. This provision of the statute does not render incomplete a promissory note indorsed in blank by the payee and afterwards stolen from him by the maker and presented by the thief to a bank which discounts it in good faith, because such a note takes effect when delivered by the maker to the payee, and is made payable to bearer by the payee's indorsement in blank before the theft. Massachusetts National Bank *v.* Snow, 187 Mass. 160.

(*b*) Thus, as between the original parties, it can be shown by parol evidence that the note although delivered was only to become binding in case the maker sold certain bonds placed in his hands as agent for sale. Hill *v.* Hall, 191 Mass. 253.

(*c*) This provision changes the law in some of the States. In some cases it has been held that an instrument in the form of a negotiable promissory note, which has never been delivered by the alleged maker, has no legal existence as such note, and the party sought to be charged upon it may always, unless estopped by his own negligence, defend successfully against it, without regard to the time when or the circumstances under which it was acquired by the holder. Roberts *v.* McGrath, 38 Wis. 52; Chipman *v.* Tucker, 38 Wis. 43; Griffiths *v.* Kellogg, 39 Wis. 290; Burson *v.* Huntington, 21 Mich. 416. This change, like some others made by the act, is in the direction of facilitating the circulation of commercial paper. The provision does not apply, however, in the case of an incomplete instrument completed and negotiated without authority. See section 34.

(*d*) Possession of the instrument is *prima facie* evidence of title. Newcombe *v.* Fox, 1 App. Div. 389.

§ 36. **Construction where instrument is ambiguous.**—Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount (*a*);

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued (*b*);

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail (*c*);

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election (*d*);

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser (*e*);

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon (*f*).

(*a*) The figures in the margin of a bill or note are regarded as simply a memorandum or abridgement for convenience or reference, and form no part of the instrument. Smith *v.* Smith, 1 R. I. 388; Norwich Bank *v.* Hyde, 13 Conn. 281; Schreyer *v.* Hawkes, 22 Ohio St. 308. Where the marginal figures of a bill were 245 l., but the words "two hundred pounds" were written in the body of the instrument, it was held to be for the latter sum. Saunderson *v.* Piper, 5 Bing. N. C. 425. In Garrard *v.* Lewis (L. R. 10 Q. B. Div. 30, 32) Lord Justice Bowen, speaking of the import and effect of marginal figures at the head of a bill of exchange, said: "They do not seem in general to have been considered among merchants as of the same effect and value as the mention of the sum contained in the body of the bill. The history of these marginal figures may perhaps be shortly summarized as follows:— The first model of a bill of exchange preserved to us, and which dates from 1381, does not, I believe, possess them, though it does possess the nature or vocation with which merchants' bills used generally to commence, and which

usually preceded the figures. The marginal figure at the head of a bill was probably added at a very early date, in order that the amount of the bill might strike the eye immediately, and was in fact a note, index or summary of the contents of the bill which followed."

(*b*) Kingsley *v.* Sampson, 100 Ill. 54.

(*c*) But this rule does not permit of the rejection of any of the printed matter which by any reasonable construction may be reconciled with the written part. Miller *v.* Hannibal & St. Jo. R. R. Co., 90 N. Y. 430; Magee *v.* Lovell, L. R. 9 C. P. 107; Joyce *v.* Realm Ins. Co. L. R., 7 Q. B. 580.

(*d*) Heise *v.* Bumpass, 40 Ark. 547. Where the instrument ran "On demand, I promise to pay A. B., or bearer, the sum of fifteen pounds, value received," and was addressed in the margin to one J. Bell, who wrote upon it, "Accepted, J. Bell," it was considered to be in effect the note of J. Bell, as it contained a promise to pay, although, in terms, it was an acceptance. Block *v.* Bell, 1 M. & R. 149. Where the instrument was in the following form: "London, August 5, 1833. Three months after date I promise to pay Mr. John Bury or order forty-four pounds, eleven shillings, and five pence, value received, John Bury," and was addressed in the lower left-hand corner "J. B. Grutherot, 35 Montague Place, Bedford Place," and Grutherot's name was written across the face as an acceptance, and Bury's name across the back as an indorsement, it was held that Bury might be held either as the drawer of the bill against Grutherot, or as the maker of the note, and therefore was bound without notice of dishonor. Edis *v.* Bury, 6 Barn. & Cres. 433. In another case the instrument ran: "Two months after date I promise to pay A. B. or order ninety-nine pounds, H. Oliver," and was addressed to J. E. Oliver and accepted by him. The court said: "It is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or as a bill of exchange." Lloyd *v.* Oliver, 18 Q. B. 471.

(*e*) For example, if a person should write his name across the face of a note, he would, under this provision, be deemed an indorser. There are some decisions which hold that in such case he would be deemed a joint maker. It is, perhaps, not very important which view is adopted, so that the rule upon the subject is fixed and certain. Throughout the act it has been the policy to make all irregular parties indorsers. See section 114. In Ger-

mania Nat. Bank *v.* Mariner, 129 Wis. 544, "A note read: "Four months after date the Northwestern Straw Works promise to pay,' etc., and was signed 'The Northwestern Straw Works, E. R. Stillman, Treas.; John W. Mariner.'" Mariner was the secretary of the corporation, duly authorized to sign the note on its behalf:—*Held,* that the signature of Mariner was not so placed on the instrument as to make it doubtful in what capacity he intended to sign, within the meaning of this section. The Court said: "This provision, by its very terms, applies only to a case of doubt arising out of the location of the signature upon the instrument. Names are sometimes placed at the side, on the end, or across the face of the instrument, and thus a doubt arises as to whether the signer intended to be bound as a maker or indorser, or perhaps as a guarantor, and to solve these doubts the section in question was evidently framed. It was to settle a doubt fairly arising from the ambiguous location of the name, and applies to no other. In the present case there is no doubt of this nature. The signature of Mr. Mariner is placed in the usual and proper, in fact the only proper, place for a maker. The doubt arising is not a doubt whether he intended to sign as maker, indorser, or guarantor, for it is clear from the location of the name that he did not intend to sign as indorser or guarantor, but simply a doubt whether he intended to sign in an individual or in a representative capacity as maker. To say that, where it conclusively appears from the instrument that the signer intended to sign as a maker, the statute is intended to make him an indorser, would be little short of ridiculous. The statute was passed to meet a case where it is doubtful from the instrument whether a man intended to become an indorser, not to make an indorser out of a person who, without doubt, intended to sign as a maker, either individually or as representative of another. We have no doubt, therefore, that this section has no application to the present case." Where two officers of a corporation indorsed on the company's demand note the following words: "For value received, we hereby guarantee the prompt payment of this note," and followed the words with their signatures, they were held liable as sureties, and not as guarantors of the instrument. Iron City National Bank *v.* Rafferty, 207 Pa. St. 238.

(*f*) Monson *v.* Drakeley, 40 Conn. 559; Solomon *v.* Hopkins, 61 Conn. 47; Dart *v.* Sherwood, 7 Wis. 523.

§ 37. **Liability of person signing in trade or assumed name.**— No person is liable on the instrument whose signature does not appear thereon (*a*), except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name (*b*).

(*a*) Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. Manufacturers', Etc., Bank *v.* Love, 13 App. Div. (N. Y.) 561; Briggs *v.* Partridge, 64 N. Y. 363. Under this section, a firm upon whom a draft is drawn by its commercial traveller is not liable thereon before acceptance by reason of any custom in previous years to honor such drafts. Seattle Shoe Co. *v.* Packard, 43 Wash. 527.

(*b*) A person may become a party to a bill or note by any mark or designation he chooses to adopt, provided it be used as a substitute for his name and he intends to be bound by it. De Witt *v.* Walton, 9 N. Y. 574; Brown *v.* Butchers' & Drovers' Bank, 6 Hill, 443.

§ 38. **Signature by agent; authority; how shown.**— The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

§ 39. **Liability of person signing as agent, etc.**— Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a represenative capacity, he is not liable on the instrument if he was duly authorized (*a*); but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability (*b*).

(*a*) In the original draft submitted to the Conference of Commissioners on Uniformity of Laws this section read as follows:

"Where a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument; but the mere addition of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. In determining whether a signature is that of the principal or of the agent by whose hand it is written, that construction is to be adopted which is most favorable to the validity of the instrument." This is the English rule, and was the rule in New York prior to the statute. Under that rule a person signing for or on behalf of a principal was not liable *on the instrument,* notwithstanding he had no authority to bind his principal. There was an implied warranty on his part that he possessed such authority, and if he did not, he became liable upon such warranty for the damages resulting from the breach. Miller *v.* Reynolds, 92 Hun, 400. But no action could be maintained against him on the instrument, when by its terms it did not purport to bind him. And his liability upon the implied warranty did not accompany the transfer of the instrument, unless the claim founded upon the warranty was also assigned to the person to whom the instrument was transferred. (*Id.*) The effect of the section, as it now stands, is, probably, to permit the holder to sue the agent on the instrument, if he was not duly authorized to sign the same on behalf of the principal.

(*b*) Thus, he is not relieved from liability by adding the descriptive term "trustee," Bank *v.* Looney, 99 Tenn. 278, or "administrator," or "guardian." Emm *v.* Carroll, 1 Yerger, 144; McWherter *v.* Jackson, 10 Humphrey, 208; Carter *v.* Wolf, 1 Heisk, 674, or "agent," Sumwalt *v.* Rigeley, 20 Md. 107, or "secretary," Daniel *v.* Glidden, 38 Wash. 556. Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking *bona fide* and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons, and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbre-

viation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This rule is founded on the general principle that in a contract every material thing must be definitely expressed and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, or if the purpose is equivocal, the obligation is that of its apparent makers. Casco National Bank *v.* Clark, 139 N. Y. 307, 310; First Nat. Bank *v.* Wallis, 150 N. Y. 455. In Megowan *v.* Peterson, 173 N. Y. 1, it was held that a trustee of an insolvent firm, for the benefit of creditors thereof, appointed by such firm and its creditors, is not personally liable under this section, upon a note signed by him as "trustee," but without disclosing his representative capacity upon the face of the note, where the payee is one of such creditors and the consideration for which the note was given was property purchased from the payee for the benefit of the trust estate. The Court, speaking of this provision of the statute, said: "We do not understand that the statute to which we have alluded was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown." See also Kerby *v.* Ruegamer, 107 App. Div. (N. Y.) 491; Crandall *v.* Rollins, 83 *Id.* 618.

§ 40. Signature by procuration; effect of.— A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority (*a*).

(*a*) The words "per procuration" have a special technical significance. They are an express intimation of a special and limited authority; and a person taking a bill so drawn, accepted, or indorsed, is bound to inquire into the extent of the authority. Byles on Bills, 33. But an indorsement by an agent "per pro" which is within the powers conferred upon him is binding upon his principal as against *bona fide* holders for value, though the agent abused his authority. Bryant *v.* La Banque du Peuple

[1893], App. Cases, 170. The term is seldom, if ever, used in this country.

§ 41. Effect of indorsement by infant or corporation.— The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation (*a*) or infant (*b*) may incur no liability thereon.

(*a*) Thus, if a note should be drawn payable to the order of a corporation, and the corporation should indorse the same without consideration, such indorsement would pass the title to a subsequent holder with notice of the facts, though the corporation would not be liable to him as an indorser. See note to section 55.

(*b*) The statute changes the law. See Roach *v.* Woodhall, 91 Tenn. 206. The change, like others, was made to facilitate the ready and safe transfer of commercial paper.

§ 42. Forged signature; effect of.— Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature (*a*), unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority (*b*).

(*a*) Buckley *v.* Second Nat. Bank of Jersey City, 35 N. J. Law, 400; Whiteford *v.* Munroe, 17 Md. 135. But it does not follow from this provision that proof of one forged signature on a note must of necessity, and in all cases, be given effect to avoid the note in favor of those whose signatures thereto are found to be genuine. It is the forged or unauthorized signature that is declared to be inoperative; and the inhibitory clause forbids recovery on the instrument as against any party where the right of recovery is predicated on such inoperative signature. Beem *v.* Farrell (Iowa), 113 N. W. Rep. 509. The agent of the plaintiff

who had power of attorney to receive and indorse checks for the plaintiff and to deposit them in certain banks, indorsed them with the name of the plaintiff, to whom they were payable, adding his own indorsement, and transferred them to certain stock-brokers with whom he was speculating, as margins on his personal transactions, the brokers having knowledge of the agency:—*Held,* that the unauthorized diversion of the checks by the agent, after indorsement, did not make the original indorsement of the plaintiff's name a forgery under this section. Salen *v.* Bank of State of New York, 110 App. Div. (N. Y.) 636. P, by fraudulently representing himself to be H, obtained a check from T, payable to the order of H. At the time, T knew of the existence of H, and delivered the check to P supposing that he was H. P indorsed H's name on the check, and gave it to D, who collected the money thereon from the bank, which charged the same against the account of T:—*Held,* that under this section the signature made by P transferred no interest, and that T could recover the amount from the bank. Tolman *v.* American National Bank, 22 R. I. 462. Stiness, C. J. said: "We have referred to authorities because the defendant's counsel so earnestly and ably argued that the act did not alter the law-merchant that it seemed proper to show that the law in this respect, outside of the act, is in a very unsatisfactory state and that the act is right. We do not think that the act does alter the law as it was when, a few years ago, it seems to have been switched off on a fallacy in some places. One of the advantages of the act is in settling the question. Waiving the question of forgery, about which the cases we have cited differ, the signature in this case is clearly one 'made without the authority of the person whose signature it purports to be,' and, therefore, it is 'wholly inoperative.' This being so, the defendant cannot justify its action under it, there being no evidence of any conduct by the plaintiff to mislead the defendant and so to estop his present claim. As the case stood, the plaintiff had ordered money paid to Haskell. The bank had not so paid it. The fact that the plaintiff had been imposed upon did not relieve the bank from its duty to see that the money was paid according to order." But where the instrument is intended for the person to whom it is delivered, his indorsement will pass a good title to a holder in due course, though he procured the same by falsely representing himself to be another person of the same name. Jamieson *v.* McFarland, 43 Wash. 153. The difference

between the two cases is, that in the former, the drawer of the check or draft intends it for a particular person other than the one to whom he delivers it; in the latter case, the person to whom he delivers it is, in fact, the one for whom he intended it. Compare Land, etc. Co. *v.* Northwestern Nat. Bank, 196 Pa. St. 230.

(*b*) Where the transaction is contrary to good faith and the fraud affects individual interests only, ratification is allowed; but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted. Forgery does not admit of ratification. A forger does not act on behalf of, nor profess to represent, the person whose handwriting he counterfeits; and the subsequent adoption of the instrument cannot supply the authority which the forger did not profess to have. Henry Christian Building and Loan Association *v.* Walton, 181 Pa. St. 201; Lyon *v.* Phillips, 106 Pa. St. 57. But cases sometimes arise where parties are estopped to dispute the genuineness of their signatures. Crout *v.* DeWolf, 1 R. I. 393. Thus, where a customer has been guilty of negligence in examining the account and vouchers returned to him by his bank, he will not be permitted to dispute the account because some of the checks are forgeries. Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96. Where one whose name has been forged to a note has received no benefit from the forgery, and the forger was not his agent for any purpose, he is not bound, as a matter of legal duty, when the note is first shown to him, to repudiate or disclaim at once the genuineness of the signature. His failure to do so is evidence, in the nature of an admission, which may be considered as bearing upon the question whether he assumed the signature as his own, but it is not conclusive. Traders' National Bank *v.* Rogers, 167 Mass. 315. As to what conduct will amount to an estoppel, see Terry *v.* Bissel, 26 Conn. 41. A married woman, to shield her husband, ratified a signature on a promissory note to a bank, purporting to be hers but forged by her husband. At maturity the note was surrendered to the husband on his giving in renewal a note similarly forged which was accepted in good faith by the bank. In an action by the bank on the first note, it was held, that the substitution and acceptance of the second forged note did not constitute a payment, so as to bar an action on the note ratified by the defendant. Central National Bank *v.* Copp, 184 Mass. 328.

ARTICLE III.

Consideration of Negotiable Instruments.

Section 50. Presumption of consideration.
51. What constitutes consideration.
52. What constitutes holder for value.
53. When lien on instrument constitutes holder for value.
54. Effect of want of consideration.
55. Liability of accommodation party.

§ 50. **Presumption of consideration.**— Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value (*a*).

(*a*) Riverside Bank *v.* Woodhaven Junc. L. Co., 34 App. Div. (N. Y.) 362; Delano *v.* Bartlett, 6 Cushing, 364; Lines *v.* Smith, 4 Fla. 47; Flint *v.* Phipps, 16 Oregon 437. This is the rule, though no consideration be expressed. Wilson *v.* Wilson, 26 Oregon 315. See section 25. The statute makes this rule applicable only to instruments which are negotiable. But by the law merchant a bill of exchange, though it lacks the words payable "to order," or to "bearer," which are essential to negotiability (see sections 20, 210), imports a consideration. Louisville R. R. Co. *v.* Caldwell, 90 Ind. 251; Cowan *v.* Hallock, 9 Colo. 576. The statute has not altered this rule. See section 7. But as regards the presumption of consideration in the case of non-negotiable notes, the law of New York and of some of the other States has been changed. See note to section 320. As to the burden of proof, see Delano *v.* Bartlett, 6 Cushing, 364. In Lassas *v.* McCarty, 47 Oregon 474, it was said that the presumption of the statute that a promissory note was given for a sufficient consideration is of much importance in business transactions, and should not be lightly disre-

garded, in favor of those who have carelessly, or by being unduly confiding, set afloat commercial paper. The production of the paper establishes *prima facie* that there was a consideration. Dawson *v.* Wombles, 123 Mo. App. 340; Bank of Monticello *v.* Dooly, 113 Wis. 590, 593; Hickok *v.* Bunting, 92 App. Div. (N. Y.) 167. But when this presumption is met by proof tending to rebut it, then, on the question whether there was a consideration, the burden of proof is on the holder throughout the trial. Lombard *v.* Byrne, 194 Mass. 236, 238. As to the effect of a failure to deny that the paper was given for value see Benedict *v.* Kress, 97 App. Div. (N. Y.) 65.

§ 51. **Consideration, what constitutes.**—Value is any consideration sufficient to support a simple contract (*a*). An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time (*b*).

(*a*) See Conover *v.* Stillwell, 34 N. J. Law, 54; Eaton *v.* Libbey, 165 Mass. 218; Whitney *v.* Clary, 145 Mass. 156; Shawmut Nat. Bank *v.* Manson, 168 Mass. 425; Raymond *v.* Sellick, 10 Conn. 480. Under this provision, a bank discounting a note and obtaining credit in favor of the indorser in a solvent bank for the amount of the discounted paper is a holder for value. Elgin City Banking Co. *v.* Hall (Tenn.), 108 S. W. Rep. 1068.

(*b*) For cases applying the statute see Singer Manufacturing Co. *v.* Summers, 143 N. C. 102; Milius *v.* Kauffman, 104 App. Div. (N. Y.) 442; Commercial Nat. Bank *v.* Citizens' State Bank, 132 Iowa, 706. The general rule is that where a conveyance is made or security taken, the consideration of which is an antecedent debt, the grantee or the person taking the security is not regarded as a purchaser for a valuable consideration. People's Savings Bank *v.* Bates, 120 U. S. 556, 565; Weaver *v.* Borden, 49 N. Y. 286; Cary *v.* White, 52 N. Y. 138; Wood *v.* Robinson, 22 N. Y. 567; Mingus *v.* Condit, 23 N. J. Eq. 313. But in the Supreme Court of the United States, and in many of the State courts, a distinction has been made in favor of commercial paper, and the rule adopted that a *bona fide* holder taking a negotiable instrument in payment of, or as security for, an antecedent debt, is a holder for a valuable consideration entitled to protection

against all the equities between the antecedent parties. Railroad Company *v.* National Bank, 102 U. S. 14; Swift *v.* Tyson, 16 Pet. 1; National Revere Bank *v.* Morse, 162 Mass. 381; Rockville Nat. Bank *v.* Citizens' Gas Light Co., 72 Conn. 576; Roberts *v.* Hall, 37 Conn. 205; Bridgeport City Bank *v.* Welch, 29 Conn. 475; Harrold *v.* Kays, 64 Mich. 439; Fitzgerald *v.* Booker, 96 Mo. 661; Spencer *v.* Sloan, 108 Ind. 183; Quinn *v.* Hoord, 43 Vt. 375; Armour *v.* McMichael, 36 N. J. Law, 92; Fisher *v.* Fisher, 98 Mass. 303; Roberts *v.* Hall, 37 Conn. 205; Giovanovich *v.* Citizens' Bank, 26 La. Ann. 15; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540; Robins *v.* Lair, 31 Iowa 9; Hotchkiss *v.* Fitzgerald Patent etc. Co., 41 W. Va. 357; Fair *v.* Howard, 6 Nev. 304; Levy *v.* Ford, 41 La. Ann. 873. In the case of Railroad Company *v.* National Bank, *supra,* the subject was exhaustively examined by the Supreme Court of the United States, and the rule laid down that the transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the contract is without express agreement by the creditor for an indulgence, is not an improper use of such paper, and is as much in the usual course of business as its transfer in payment of such debt; and that in either case the *bona fide* holder is unaffected by equities or defenses between prior parties of which he had no notice. This exception to the general rule is based upon considerations of commercial policy, and is peculiar to commercial paper. Prior to the adoption of the statute, it was well settled in New York and several other states that one who acquired commercial paper as collateral security for a pre-existing debt was not a holder for value. Comstock *v.* Hier, 73 N. Y. 269; McBride *v.* Farmers' Bank, 26 N. Y. 450; Coddington *v.* Bay, 20 Johns. 637; Schaeffer *v.* Fowler, 111 Pa. St. 451; Martin *v.* Bank, 94 Tenn. 176; Roach *v.* Wodall, 91 Tenn. 206; Jenkins *v.* Schnaub, 14 Wis. 1; Brooks *v.* Sullivan, 129 N. C. 190. This rule produced many subtle refinements, and it would be impossible to reconcile all the decisions on the subject. For the former law in the case of accommodation paper pledged as security see Stephen *v.* Monongahela National Bank, 88 Pa. St. 157; National Union Bank *v.* Todd, 132 Pa. St. 312. A mere conditional credit which may or may not become absolute, is not value within the meaning of the statute. Commercial Nat. Bank *v.* Citizens' State Bank, 132 Iowa, 706.

§ 52. **What constitutes holder for value.**—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time (*a*).

(*a*) If a party become a *bona fide* holder for value of a bill before acceptance, it is not essential to his right to enforce it against a subsequent acceptor that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can, of course, upon presentment refuse to accept, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept the bill, he becomes primarily liable for its payment, not only to the indorsees, but also to the drawer himself. Heuertematte *v.* Morris, 101 N. Y. 70.

§ 53. **When lien on instrument constitutes holder for value.**—Where the holder has a lien on the instrument, (*a*), arising either from contract or by implication of law, he is deemed a holder for value (*b*), to the extent of his lien (*c*).

(*a*) In the previous editions of this work the author expressed the opinion that under the statute a person who takes a negotiable instrument as collateral security for an antecedent debt is a holder for value. And this is the view taken by the Supreme Court of North Carolina. Brooks *v.* Sullivan, 129 N. C. 190. In the case cited the court said: "The only question is whether, when a negotiable note is transferred before maturity as collateral security for a pre-existing debt, the assignee is such holder for value that he takes free from equities of which he had no notice. The Negotiable Instrument Statute, Acts, 1889, Chap. 733, secs. 25–27, settles that such is the case now to the extent of the debt secured, but that is a change of the law, which was previously otherwise." And the same construction was adopted by Judge Werner, now of the New York Court of Appeals, in Brewster *v.* Shrader, 26 Misc. (N. Y.) 480. In that case this able judge said: "The language of this section, when given its usual and

ordinary signification, ought to leave no room for doubt upon the subject. There is, however, such a universal disposition among lawyers to look for some hidden or subtle meaning in the most simple language, that it has become quite the fashion to require the courts to construe statutes, which, to the average lay mind, seem to require no construction. If the language of the section under consideration were not obviously clear and unequivocal, and there were need of ascertaining the legislative intent in order to give proper effect to such language, the history of the subject, of the judicial decisions in England and the states of this country, and of the proceedings of the commission on uniformity of laws, leave no possible doubt as to the purpose of this section." And after reviewing the history of the statute the learned judge continued: "It seems evident, therefore, from the history of this subject, as well as from the obvious purpose for which this statute was enacted, no less than from the language of the statute itself, that the New York rule, so called, has been modified so as to conform to the rule in England and in our federal court of last resort." But the Appellate Divisions in the First and Second Departments have been disposed to hold otherwise. Sutherland *v.* Mead, 80 App. Div. 103; Roseman *v.* Mahony, 86 App. Div. 377; Bank of America *v.* Waydell, 103 App. Div. 25, 33. In these last-mentioned cases no reference was made to section fifty-three, and probably this section was not called to the attention of the court. When its provisions are considered together with the provisions of section fifty-one the intent seems to be clear. The holder, who has taken the paper as collateral security, very plainly has a lien upon it, and, therefore, is within the terms of section fifty-three. The only question then is, whether he must be excluded from the operation of this section merely because his lien was acquired for an antecedent indebtedness. But as the statute in another place expressly declares that "an antecedent or pre-existing debt constitutes value" (sec. 51) there is no warrant for reading any such exception into the section.

(*b*) Continental Nat. Bank *v.* Bell, 125 N. Y. 38, 42; Rogers *v.* Squires, 98 N. Y. 49; Roach *v.* Woodall, 91 Tenn. 206. Thus a bank, having in its possession negotiable securities of its customer, would be, by virtue of its general lien, a holder for value to the extent of the balance due from such customer. So, any person to whom negotiable securities are pledged as collateral would be deemed a holder for value to the extent of the amount due to

him. But if such securities should be sold to pay such balance or debt, the purchaser, if a holder in due course within section 91, though he should pay less than their face value for them, could enforce them for the full amount thereof. See section 96.

(*c*) Under sections 53 and 90 a person who holds a note or bill as collateral security may sue thereon. Mersick *v.* Alderman, 77 Conn. 634. Ordinarily he is entitled to recover the full amount due on the instrument, with liability to account for the surplus to the pledgor. Camden Nat. Bank *v.* Fries-Breslin Co., 214 Pa. St. 395. But if the pledgor could not recover upon the instrument, then the extent of the recovery will be limited to the amount of the debt due to the pledgee. Stoddard *v.* Kimball, 6 Cushing, 469; Fisher *v.* Fisher, 98 Mass. 303; Chicopee Bank *v.* Chapin, 8 Metc. 40.

§ 54. **Effect of want of consideration.**—Absence or failure of consideration is matter of defense as against any person not a holder in due course (*a*); and partial failure of consideration is a defense *pro tanto* (*b*), whether the failure is an ascertained and liquidated amount or otherwise (*c*).

(*a*) As between the immediate parties to a negotiable promissory note, while the note itself is *prima facie* evidence of the consideration, the question of consideration is always open; and it is competent to the defendant to show, by parol, that there was no sufficient consideration, or that the consideration has failed, or that the paper was given for accommodation merely. Batterman *v.* Dutcher, 95 App. Div. (N. Y.) 213; Cowee *v.* Cornell, 75 N. Y. 91, 98; Anthony *v.* Valentine, 130 Mass. 119; Ingersoll *v.* Martin, 58 Md. 67; Corlies *v.* Howe, 11 Gray, 125; Breneman *v.* Furniss, 90 Pa. St. 186. The burden of proving the failure of consideration is on the party alleging it. Jennison *v.* Stafford, 1 Cush. 168. Total failure of consideration does not impose upon an innocent holder the burden of proving that he gave value for the paper. Wilson *v.* Lazier, 11 Gratt. 477; Albrecht *v.* Atrimpler, 7 Pa. St. 476. The failure of consideration does not affect the negotiability of the instrument. Dingman *v.* Amsink, 77 Pa. St. 114. The right to interpose the defense of want of consideration is governed by the *lex loci*. Herdic *v.* Roessler, 109 N. Y. 127, 133, 134.

Upon an exchange of promissory notes, each note is a valid consideration for the other, and is fully available in the hands of the holder; and the fact that one of the notes is not paid at maturity does not sustain a defense of failure of consideration in an action upon the other. Rice *v.* Grange, 131 N. Y. 149; Woman *v.* Frost, 52 N. Y. 422.

(*b*) Black *v.* Rigway, 131 Mass. 80; Cline *v.* Miller, 8 Md. 274; Davis *v.* Wait, 12 Oregon 425.

(*c*) The rule, both in this country and in England, has been that whenever the defendant is entitled to go into the question of consideration he may set up the partial, as well as the total, want of consideration. Daniel on Negotiable Instruments, § 210. But it has been held in some cases that the part alleged to have failed must be distinct and definite, for only a total failure or the failure of a specific and ascertained part can be availed of by way of defense; and in the case of an unliquidated claim the party must resort to his cross action. Pulsifer *v.* Hotchkiss 12 Conn. 234; Drew *v.* Towle, 7 Fost. 412; Moggridge *v.* Jones, 14 East. 485; Trickey *v.* Larne, 6 M. & W. 278. In other cases it is held that the defendant may recoup his damages though they be unliquidated. Davis *v.* Wait, 12 Oregon 425; Wyckhoff *v.* Runyon, 33 N. J. Law, 107. As to what is necessary to constitute one a holder in due course, see sections 52–56.

§ 55. **Liability of accommodation party.**—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person (*a*). Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party (*b*).

(*a*) An accommodation note, in the strict sense, is a loan of the maker's credit, without instructions as to the manner of its use. Lenheim *v.* Wilmarding, 55 Pa. St. 73; Bankers' Iowa State Bank *v.* Mason Hand Lathe Co., 121 Iowa, 570, 572. He cannot set up as a defense that it was given without consideration; for this would defeat the very purpose for which it was made. Car-

penter *v.* National Bank of the Republic, 106 Pa. St. 170–172. In respect to third persons, the law considers him in the character he has assumed and will not permit him to allege that the paper to which he gave his name was an imposition, nor to gainsay its reality by proof that it was a fiction. It shall be taken *pro veritate* that he was the maker, for *de veritate* that was the very thing he was intended to be. Bank of Montgomery County *v.* Walker, 9 S. & R. 229; Stephen *v.* Monongahela National Bank, 88 Pa. St. 157, 162–3. And this is the rule though the note be pledged merely as collateral security for the debt of the payee. Lord *v.* Ocean Bank, 20 Pa. St. 384. A mutual exchange of notes will amount to a sufficient consideration, so that the notes will not be regarded as accommodation paper. Williams *v.* Banks, 11 Md. 198; Rice *v.* Grange, 131 N. Y. 149; Woman *v.* Frost, 52 N. Y. 422.

(*b*) For cases in which the provision of the statute has been applied, see Packard *v.* Windholz, 88 App. Div. (N. Y.) 365; Smith *v.* State Bank, 104 N. Y. Supp. 750; Black *v.* First Nat. Bank of Westminster, 96 Md. 399; White *v.* Savage, 48 Oregon, 604; Bankers' Iowa State Bank *v.* Mason Hand Lathe Co., 121 Iowa, 570. The statute does not change the law of New Jersey so as to validate the contract of a married woman obligating her as surety for her husband or to pay the debt of another person. Peoples' Nat. Bank *v.* Schepflin, 73 N. J. Law, 29, 38. In Massachusetts, on the other hand, since the Negotiable Instruments Act, as well as before, if a married woman indorses for accommodation the note of a partnership of which her husband is a member payable to him and indorsed also by him, she is liable on her contract of indorsement to a bank to which her husband acting for the partnership negotiates the note. Middleborough National Bank *v.* Cole, 191 Mass. 168. An accommodation indorser has the right to retract his indorsement at any time before the paper is negotiated. His consent to be indorser is necessary to make him such. He cannot be compelled to indorse whether he will or no; and as the instrument is a mere blank piece of paper until it passes into other hands for valuable consideration, it follows that he has the same right to retract the indorsement already made as he had to refuse his indorsement in the first instance; that is, his indorsement and his continuing to be so are alike voluntary until rights arise by the negotiation to third parties. Berkely *v.* Tinsley, 88 Va. 1001, 1004. And the

purchaser of an accommodation note, after its maturity, gets no better nor greater right to enforce it against the maker or indorser than if it were ordinary negotiable paper given for value. Cottrell *v.* Watkins, 89 Va. 801.

The provision of the statute does not apply to corporations, which, as a general rule, are without power to bind themselves as accommodation parties. A national bank has no such power, National Bank of Commerce *v.* Atkinson, 55 Fed. Rep. 465, 27 U. S. App. 88; nor has a State bank, The Bank of Genesee *v.* The Patchin Bank, 13 N. Y. 309; Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 16 N. Y. 125, 128; Morford *v.* The Farmers' Bank of Saratoga County, 26 Barb. 568; nor a manufacturing corporation, The Central Bank *v.* The Empire Stone Dressing Co., 26 Barb. 23; The Bridgeport City Bank *v.* The Empire Stone Dressing Co., 30 Barb. 421; The Farmers' & Mechanics' Bank *v.* The Empire Stone Dressing Co., 5 Bosw. 275; Wahlig *v.* The Standard Pump Manufacturing Co., 25 N. Y. St. Rep. 864; Filon *v.* The Miller Brewing Co., 38 N. Y. St. Rep. 602; National Bank of Newport *v.* Snyder Manufacturing Co., 117 App. Div. (N. Y.) 371; Monument National Bank *v.* Globe Works, 101 Mass. 57; nor a railroad company, Davis *v.* Old Colony Railroad Company, 131 Mass. 258; J. G. Brill Co. *v.* Norton & Taunton St. Ry. Co., 189 Mass. 431; nor a warehousing and security company, The National Park Bank *v.* G. A. M. W. & S. Co., 116 N. Y. 281; nor a life insurance company, Aetna National Bank *v.* Charter Oak Life Insurance Company, 50 Conn. 167; nor a turnpike company, Hall *v.* Auburn Turnpike Co., 27 Cal. 256; nor an oil company, Culver *v.* Reno Real Estate Company, 91 Penn. St. 367. No corporations organized under the statutes of New York are authorized to bind the property of their shareholders by accommodation indorsements. Fox *v.* Rural Home Co., 90 Hun, 365, 367. But where a corporation is authorized to take a note for any purpose, the presumption in regard to any note executed to it is that it was executed for a legitimate purpose. Howard *v.* Boorman, 17 Wis. 459; Lehigh Valley Coal Co. *v.* West Depere Agr. Works, 63 Wis. 45. When in an action upon a promissory note it is shown without dispute that the defendant, a manufacturing corporation, made a note for the accommodation of the payee, another corporation, and that the notes were renewed from time to time by the payee, which

always paid the discount, the defendant is entitled to a ruling that the paper is an accommodation paper within the terms of the Negotiable Instruments Law, and it is error to submit that question to the jury. Nat. Bank of Newport *v.* Snyder Manufacturing Co., 117 App. Div. 370. An indorsement by a partner of his separate accommodation note with the name of his firm is a sufficient indication of the nature of the transaction to make it the duty of the bank which discounts it to inquire into his authority to use the firm name for the occasion, unless there are circumstances from which the authority can be implied. Tanner *v.* Hall, 1 Pa. St. 417.

The statute does not change the rule that an accommodation party has the right to determine for himself what use shall be made of the instrument which he signs. He may impose material or immaterial conditions and terms, and no person can enforce the instrument against him who takes it in violation of such terms and conditions and with notice thereof. Benjamin *v.* Rogers, 126 N. Y. 60. Thus, where the defendant indorsed a note upon the condition that it should not be negotiated in New York, assigning as a reason that he did not wish to be sued upon it in the State, it was held that, while the restriction did not seem to be material, yet the diversion was a defense to the indorser as against one who was not a holder for value. United States Nat. Bank *v.* Ewing, 131 N. Y. 506. But see Rogers *v.* Sipley, 35 N. J. Law, 86.

ARTICLE IV.

Negotiation.

Section 60. What constitutes negotiation.
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78. Striking out indorsement.
79. Transfer without indorsement; effect of.
80. When prior party may negotiate instrument.

§ 60. **What constitutes negotiation.**—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer (*a*) it is negotiated by de-

livery; if payable to order (*b*) it is negotiated by the indorsement (*c*) of the holder completed by delivery (*d*).

(*a*) As to what instruments are payable to bearer, see section 28.

(*b*) As to what instruments are payable to order, see section 27.

(*c*) An indorsement is usually written on the back of the instrument, but the place is not essential. If the payee write his name on any part of the instrument, with the intention of indorsing it, that is a sufficient indorsement. Haines *v.* Dubois, 29 N. J. Law, 259. See section 36, subd. 6.

(*d*) The indorsement alone without delivery conveys no title. Dann *v.* Norris, 24 Conn. 337; Clark *v.* Sigourney, 17 Conn. 520; Middleton *v.* Griffith, 57 N. J. Law, 442; Spencer *v.* Carstarphen, 15 Colo. 445. As between the original parties and others having notice, a conditional delivery, as well as want of consideration, may be shown; and parol evidence that the delivery was conditional, and of the terms of the condition, is not open to the objection of varying or contradicting the written contract. Higgins *v.* Ridgeway, 153 N. Y. 130; Persons *v.* Hawkins, 41 App. Div. (N. Y.) 171; Simmons *v.* Thompson, 29 App. Div. (N. Y.) 559; Hodge *v.* Smith, 130 Wis. 326; Ricketts *v.* Pendleton, 14 Md. 320; McFarland *v.* Sikes, 54 Conn. 250. But a parol agreement, although entered into at the time of making negotiable paper, that the payee will not negotiate it and will renew it, etc., is inadmissible to vary the effect of the paper. Heist *v.* Hart, 73 Pa. St. 286. So, it has been held that evidence of an oral agreement that payment was not to be called for until certain paintings of the maker had been sold is an attempt to vary the written contract. Wooley *v.* Cobb, 165 Mass. 503. See Woods Son Co. *v.* Schaefer, 173 Mass. 443. By former statutes in some States, notes made payable to a person named therein or bearer must have been indorsed to pass the legal title. Garvin *v.* Wiswell, 83 Ill. 218; Blackman *v.* Lehman, 63 Ala. 547.

§ 61. **Indorsement; how made.**— The indorsement must be written on the instrument itself or upon a paper attached thereto (*a*). The signature of the indorser, without additional words, is a sufficient indorsement (*b*).

(*a*) Crosby *v.* Roub, 16 Wis. 616; Folger *v.* Chase, 18 Pick. 63; French *v.* Turner, 15 Ind. 59. The rule as commonly stated is,

that where there is not room on the bill, the indorsement may be on an allonge. But it is not necessary that there should be a physical impossibility of writing the indorsement on the instrument itself; it may be on an allonge, whenever the necessity or convenience of the parties requires it. See cases above cited. Besides, any such statement of the rule would give rise to a question of fact which might be determined variously. But see Bishop *v.* Chase, 156 Mo. 158; Franklin *v.* Twogood, Iowa, 515; Peach *v.* Bligh, 37 Ill. 317; Haskell *v.* Brown, 65 Ill. 29; Wall *v.* Hollenbeck, 19 Neb. 639.

(*b*) This is the customary and mercantile form of indorsement. But an indorsement of a promissory note as follows: "For value received, I hereby assign, transfer and set over to B all my right, title, interest and claim in the within note," passes a legal title to the same and does not destroy its negotiability. Hall *v.* Toby, 110 Pa. St. 318; Thorp *v.* Mindeman, 123 Wis. 149. Where the name of the drawee is stamped on the back of a draft with a rubber stamp, by one having authority to do so and with intent to indorse it, it is a valid indorsement, but does not prove itself. Mayers *v.* McRimmon, 140 N. C. 640. And the transferee having possession under such an indorsement is deemed *prima facie* a holder in due course. Evans *v.* Freeman, 142 N. C. 61.

§ 62. **Indorsement must be of entire instrument.**— The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument (*a*). But where the instrument has been paid in part, it may be indorsed as to the residue (*b*).

(*a*) For example, where a note for $500 was indorsed, "Pay to L four hundred dollars out of this note," it was held L could not recover from the maker. Lindsay *v.* Price, 33 Tex. 282.

(*b*) The indorsement of a partial payment on the instrument does not render it non-negotiable. Smith *v.* Shippey, 182 Pa. St. 24.

§ 63. **Kinds of indorsement.**— An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 64. **Special indorsement; indorsement in blank.**—A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery (*a*).

(*a*) See section 28. The legal effect of an indorsement in blank may not be varied by parol. Torbert *v.* Montague, 38 Colo. 325.

§ 65. **Blank indorsement; how changed to special indorsement.**— The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement (*a*).

(*a*) Beckwith *v.* Angell, 6 Conn. 317. Thus, he might write over it a special indorsement to himself or to some other person. But he could not write over it a contract of guaranty; for the effect of this would be to deprive the indorser of his right to notice in case of non-payment. Belden *v.* Hann, 61 Iowa 42. Such a contract would be inconsistent with the character of the indorsement.

§ 66. **When indorsement restrictive.**— An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument (*a*); or

2. Constitutes the indorsee the agent of the indorser (*b*); or

3. Vests the title in the indorsee in trust for or to the use of some other person (*c*).

But the mere absence of words implying power to negotiate does not make an indorsement restrictive (*d*).

(*a*) "Pay Bank of A only" would be such an indorsement as is meant here.

(*b*) The most frequent instance of this is the indorsement "for collection." Such indorsement does not transfer the title to the indorsee, but constitutes him merely an agent to present the paper, and receive payment thereof for the account of the owner. Commercial National Bank *v.* Armstrong, 148 U. S. 50; National Butchers' and Drovers' Bank *v.* Hubbell, 117 N. Y. 384; Armstrong *v.* National Bank of Boyertown, 90 Ky. 431; Freeman's Bank *v.* National Tube Works, 151 Mass. 413; Sweeney *v.* Easter, 1 Wall. 173; Commercial National Bank *v.* Hamilton National Bank, 42 Fed. Rep. 880; City Bank of Sherman *v.* Weiss, 68 Tex. 332; Central R. R. Co. *v.* First National Bank of Lynchburg, 73 Ga. 384; Bank of Metropolis *v.* First National Bank of Jersey City, 19 Fed. Rep. 658; Blaine *v.* Bourne, 11 R. I. 119; Cecil Bank *v.* Farmers' Bank, 22 Md. 148; Northwestern National Bank v. Bank of Commerce, 107 Mo. 402. Where an indorsement in blank is accompanied by a letter stating that the draft is for "collection and credit," the indorsement and letter must be read together, and the effect is to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement. Bank of America *v.* Waydell, 187 N. Y. 115. As to the liability of an indorser to whom the instrument has been indorsed "for collection," see note to section 116.

(*c*) Lloyd *v.* Sigourney, 5 Bing. 252; 3 M. & P. 229; Snee *v.* Prescott, 1 Atk. 245. Illustration: Pay A for account of B. In such case the title passes to A; but the indorsement is restrictive to the extent that it gives notice that the instrument cannot be negotiated by A for his own debt or for his own benefit. Hook *v.* Pratt, 78 N. Y. 371, 375.

(*d*) Thus, if the instrument is drawn to the order of A, his indorsement "Pay to B" does not restrict the further negotiation of the instrument, though the words "or order" are not included in the indorsement. See Leavitt *v.* Putnam, 3 N. Y. 494.

§ 67. **Effect of restrictive indorsement; rights of indorsee.** — A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;

2. To bring any action thereon that the indorser could bring (*a*);

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so (*b*).

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

(*a*) This provision of the statute was applied in Smith *v.* Bayer, 46 Oregon, 143. The holder of negotiable paper may sue in his own name, though but an agent for others. Ward *v.* Tyler, 52 Pa. St. 393. The statute enables a bank to sue in its own name on paper indorsed to it "for collection." As to whether this could be done before the statute there was some conflict in the authorities. The right is sustained by Wilson *v.* Tolson, 79 Ga. 137; Cummings *v.* Kohn, 12 Mo. App. 585; Wintermute *v.* Torrent, 83 Mich. 555; Regina Flour Mill Co. *v.* Holmes, 156 Mass. 11; Spofford *v.* Norton, 126 Mass. 333; Whiten *v.* Hayden, 9 Allen, 408; Roberts *v.* Parrish, 17 Oregon 583; McDaniel *v.* Pressler, 3 Wash. 636; Ward *v.* Tyler, 52 Pa. St. 393. But in Rock County National Bank v. Hollister, 21 Minn. 385, it was held that the provisions of the Code requiring the action to be brought in the name of the real party in interest would prevent an indorsee to whom the instrument was indorsed "for collection" from maintaining the action.

(*b*) The restrictive indorsee takes the paper subject to all equities that might have been asserted by the principal obligor had it not been indorsed. Smith *v.* Bayer, 46 Oregon, 143.

§ 68. **Qualified indorsement.** — A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of

similar import (*a*). Such an indorsement does not impair the negotiable character of the instrument (*b*).

(*a*) Grant *v.* Fleming, 46 Pa. St. 140; Cowles *v.* Harts, 3 Conn. 522. But the words employed must clearly indicate that the indorser intends to disclaim liability. Fassin *v.* Hubbard, 55 N. Y. 470. Hence, where the payee wrote above his signature an assignment in the following form, "I hereby assign the within note to ———," Held:— that this did not relieve him from liability as indorser. Markey *v.* Corey. 108 Mich. 184. The words "without recourse" following the name of the first, and preceding the name of a second, indorser may, as between them, be shown by parol evidence to apply to the former instead of to the latter. Corbett *v.* Fetzer, 47 Neb. 269. And this although the second indorsee took it without knowing that the limitation was applicable to the first indorser. Fitchburg Bank *v.* Greenwood, 2 Allen, 434.

(*b*) Statute applied, Elgin City Banking Co. *v.* Hall, (Tenn.) 108 S. W. Rep. 1068. A qualified indorsement in no respects affects the negotiability of the instrument, but simply qualifies the duties, obligations and responsibilities of the indorser resulting from the general principles of the law. Stewart *v.* Preston, 1 Fla. 10, 22. And whatever interest would pass by a general or full indorsement will pass by a qualified indorsement. Stewart *v.* Preston, 1 Fla. 10, 22; Epler *v.* Funk, 8 Pa. St. 468. If the indorsement is in blank, without recourse, any subsequent holder is authorized to fill up the blank with his own name as indorsee. Lyon *v.* Ewings, 17 Wis. 61. A qualified indorsement is not such a departure from the usual course of business as to put the transferee on inquiry as to the equities between the original parties. Bisbing *v.* Graham, 14 Pa. St. 14; Lomax *v.* Picot, 2 Rand. 260. And this is so, though the words without recourse are added to an indorsement in the following form: "For value received I hereby sell, transfer and assign the within note." Thorp *v.* Mindeman, 123 Wis. 140 (a case arising under the statute).

§ 69. **Conditional indorsement.**— Where an idorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled

or not (*a*). But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally (*b*).

(*a*) The first sentence is the same as section 33 of the English Bills of Exchange Act with a slight modification. In his note to that section Judge Chalmers says: "This section alters the law. It was formerly held that if a bill was indorsed conditionally, the acceptor paid it at his peril if the condition was not fulfilled. This was hard on him. If he dishonored the bill he might be liable to damages, and yet it might be impossible for him to find out if the conditions had been fulfilled." See Daniel on Neg. Inst., sections 697, 698*a*. There appear to be no American cases upon the subject; and the only English case is Robertson *v.* Kensington, 4 Taunt. 30.

(*b*) The rule adopted here is somewhat analogous to that which gives to an indorser who has paid a note in part an equitable right *pro tanto* in the proceeds, where the holder afterward collects the whole amount of the note from the maker. See Madison Square Bank *v.* Pierce, 137 N. Y. 444.

§ 70. **Indorsement of instrument payable to bearer.**— Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery (*a*); but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

(*a*) See Johnson *v.* Mitchell, 50 Tex. 212; Smith *v.* Clarke, Peake, 225; Daniel on Neg. Inst., sections 663*a*, 696. Where a bill accepted and indorsed by the payee, in blank, was by the next holder indorsed specially, it was held, that the first indorsement being in blank, the bill was afterward transferable by mere delivery, and a holder, by delivery, might strike out the special indorsement and in a suit against the acceptors declare and recover, as the indorsee of the payee. Mitchell *v.* Fuller, 15 Pa. St. 268. A check payable to a certain named person, or bearer, need not be indorsed, nor need the holder thereof be identified, and a bank paying such check without indentification of the

holder is not negligent, though the bank, in compliance with its custom, required it to be indorsed. Farmers & Merchants' Bank *v.* Bank of Rutherford, 115 Tenn. 64.

§ 71. **Indorsement where payable to two or more persons.** — Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others (*a*).

(*a*) Allen *v.* Corn Exchange Bank, 87 App. Div. (N. Y.) 335. As the indorsement of all the payees is necessary to give good title, an indorser of a note made payable to several payees is not liable to a transferee thereof when the maker, without authority from or knowledge of the indorser, has altered the note before negotiation by striking out the name of one payee and substituting his own name as payee thereon. First National Bank *v.* Gridley, 112 App. Div. (N. Y.) 398.

§ 72. **Effect of instrument drawn or indorsed to a person as cashier.**— Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer (*a*).

(*a*) It is common practice for banks to indorse in this manner paper remitted for collection. The rule above stated as to indorsements to cashiers of banks is supported by the following cases: Bank of the State *v.* Muskingum Bank, 29 N. Y. 619; First Nat. Bank *v.* Hall, 44 N. Y. 395; Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312; Folger *v.* Chase, 18 Pick. 63; Farmers' etc., Bank *v.* Troy City Bank, 1 Dough. (Mich.) 457; Watervliet Bank *v.* White, 1 Denio, 608; Lookout Bank *v.* Aull, 93 Tenn. 645. The commissioners deemed it wise to extend the rule to all fiscal officers of corporations. Under this provision an indorsement to the treasurer of a savings bank would make the paper payable

to the bank. So, of an indorsement to the secretary of a trust company. Under this section, it is competent in an action on a certificate of deposit made payable to S as cashier of a bank, and indorsed by him as cashier, to show that he was the cashier of such bank, and was acting in that capacity in transferring the certificate sued on. Johnson *v.* Buffalo Center State Bank (Iowa), 112 N. W. Rep. 165. And it is not competent for the bank to prove that S was making use of his official title and authority in his own individual interest, for the purpose of showing that the bank was not bound by this act. (*Id.*) The statute has been applied also in Griffin *v.* Erskine, 131 Iowa, 444, 450-451, and in First Nat. Bank *v.* McCullough, (Oregon) 93 Pac. Rep. 366.

§ 73. **Indorsement where name is misspelled, et cetera.**— Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature (*a*).

(*a*) Thus, one who, while carrying on business on his own account in the name of a company which has been incorporated, but not organized, receives in payment of a debt contracted with him in such business a promissory note payable to the order of the corporation, may transfer the note by indorsing it in his own name. Bryant *v.* Eastman, 7 Cush. 111. Conversely, a man will be bound by paper made by him in the name he adopts in his business. Salmon *v.* Hopkins, 61 Conn. 47.

§ 74. **Indorsement in representative capacity.**— Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability (*a*).

(*a*) As to the liability of executors and administrators who accept or indorse, see Schmittler *v.* Simon, 101 N. Y. 554.

§ 75. **Time of indorsement; presumption.**— Except where an indorsement bears date after the maturity of the instru-

ment every negotiation is deemed *prima facie* to have been effected before the instrument was overdue (*a*).

(*a*) Mason *v.* Noonan, 7 Wis. 609. If the defendant alleges that the paper was indorsed after it was due, the burden of proof is on him to show it. White *v.* Camp., 1 Fla. 94. This rule is important because that, in order to constitute one a holder in due course, he must have taken the instrument before it was overdue. See section 91. The indorsement of an overdue note cannot relate back to the date of the note; as a new and independent contract, it takes effect from the time it is made, and must be determined by the laws then in force and the circumstances then existing. Brown *v.* Hull, 33 Gratt. 23, 30.

§ 76. **Place of indorsement; presumption.**—Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated (*a*).

(*a*) As an indorsement is not merely a transfer of the instrument, but is a new and substantive contract embodying in itself all the terms of the instrument, the place where it was made often becomes of importance. See Ingalls *v.* Lee, 9 Barb. 647; Brown *v.* Hull, 33 Gratt. 27, 29; Smith *v.* Caro, 9 Oregon 278; Bank of British N. Am. *v.* Ellis, 6 Sawyer, 98; Freese *v.* Brownell, 35 N. J. Law 285. For example, an indorsement in Massachusetts of a note executed and payable in New York is a Massachusetts contract, and governed by the law of that State. Glidden *v.* Chamberlin, 167 Mass. 486. An indorsement in blank of a promissory note dated and payable in the State of New York is presumed both at common law and under the statute to have been made here, and one discounting the note in good faith is entitled to rely upon that presumption. Chemical Nat. Bank *v.* Kellogg, 183 N. Y. 92. And a married woman, who, at her residence in the State of New Jersey, indorses in blank, and solely for his benefit, her husband's promissory note, dated and payable in the State of New York, where it is dicounted in good faith, without notice that the indorser was a non-resident, or that the indorsement was made in another State is estopped to deny that her indorsement is a New York contract, and from claiming that it is a New Jersey contract. (*Id.*)

§ 77. **Continuation of negotiable character.**—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise (*a*).

(*a*) Cumberland Bank *v.* Hann, 3 Harr. (N. J.) 222. The law is perfectly well settled that a note or bill negotiable in form is negotiable as well after as before it becomes due. National Bank of Washington *v.* Texas, 20 Wall. 72. McSherry *v.* Brooks, 46 Md. 103, 118; French *v.* Jarvis, 29 Conn. 347; Adair *v.* Lenox, 15 Oregon 489. But the rights, duties and obligations of the parties are by no means the same. The instrument becomes, according to legal effect, payable on demand, so far as the indorser is concerned; and presentment for payment must be made within a reasonable time, and due notice of the dishonor given to the indorser. Brown *v.* Hull, 33 Gratt. 23, 28; Berry *v.* Robinson, 9 Johns. 121; Van Hoosen *v.* Van Alstyne, 3 Wend. 79; Poole *v.* Tolleson, 1 McCord, 200; Patterson *v.* Todd, 18 Pa. St. 426; Rosson *v.* Carroll, 90 Tenn. 90. But if the paper was presented at maturity and notice of dishonor given to prior parties it is not necessary that the indorsee after maturity should, in order to hold them, present the paper again and give them then notice of dishonor; for the original demand and notice were to the benefit of all subsequent holders. French *v.* Jarvis, 29 Conn. 347. As to the discharge of negotiable instruments, see sections 200-206.

§ 78. **Striking out indorsement.**— The holder may at any time strike out any indorsement which is not necessary to his title (*a*). The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

(*a*) New Haven Mfg. Co. *v.* New Haven Pulp & Board Co., 76 Conn. 126, 131-132 (a case arising under the statute). This section is declaratory of the law as it existed prior to the enactment of the statute. Jerman *v.* Edwards, 29 App. Cases D. C. 535. The holder may strike out all intervening indorsements and aver that the first blank indorser indorsed immediately to himself, Byles on Bills, 149; Preston *v.* Mann, 25 Conn. 127; Bank of

America *v.* Senior, 11 R. I. 376. This may be done at the trial, and after the plaintiff has finished his case. Mayer *v.* Jadis, 1 M. & Rob. 247. See also Morris *v.* Cude, 57 Tex. 337; Rand *v.* Dovey, 83 Pa. St. 281; Merz *v.* Kaiser, 20 La. Ann. 379; Vanarsdale *v.* Hax, 107 Fed. Rep. 878. Where a party becomes a holder of a promissory note by delivery under an indorsement in blank by the payee, he is entitled to strike out a subsequent indorsement under which he does not claim title, and in an action by him against the maker and payee, where there is no defense to the note as against any party whose name appears thereon, it is immaterial whether such subsequent indorsement is restrictive or not. Jerman *v.* Edwards, 29 App. Cases, D. C. 535.

§ 79. **Transfer without indorsement; effect of.**— Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer (*a*). But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made (*b*).

(*a*) Simpson *v.* Hall, 47 Conn. 417. Title to an instrument, drawn to order, can be transferred by delivery and by parol, and the only effect of the lack of an indorsement is to make the paper non-negotiable and admit inquiry into the equities. Meurer *v.* Phenix National Bank, 42 Misc. (N. Y.) 341. But under the statute, as well as under the law merchant, the indorsement is required to constitute the transferee a holder in due course. Mayers *v.* McRimmon, 140 N. C. 640, 642-643. Thus, the purchaser of a certified check, payable to order, who obtains title without the indorsement of the payee, holds it subject to all equities between the original parties, although he paid full consideration, without notice. Goshen National Bank *v.* Bingham, 118 N. Y. 349; Jenkinson *v.* Wilkinson, 110 N. C. 532. And an intention on the part of the payee and transferee to have the paper indorsed is not sufficient, at least in the absence of an express agreement to indorse. It is the act of indorsement, not the in-

tention, which negotiates the instrument. Goshen National Bank *v.* Bingham, *supra.* Where a check, drawn to the order and in the hands of a *bona fide* holder for value, has at his request been certified by a bank, and is a valid obligation against the maker, and there are no equities between him and the bank, the holder can recover of the bank upon the check, although the maker had not indorsed it to him. Meuer *v.* Phenix National Bank, 42 Misc. (N. Y.) 341.

(*b*) An indorsement after notice of a defense does not relate back to the transfer, so as to cut off intervening rights and remedies. (*Id.*) But in Beard *v.* Dedolph, 29 Wis. 136, it was held that the holder is protected against everything subsequent to delivery, the indorsement being held to relate back to the time of delivery as to any equity outside of the note itself.

§ 80. **When prior party may negotiate instrument.**—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE V.

Rights of Holder.

Section 90. Right of holder to sue; payment.
91. What constitutes a holder in due course.
92. When person not deemed holder in due course.
93. Notice before full amount paid.
94. When title defective.
95. What constitutes notice of defect.
96. Rights of holder in due course.
97. When subject to original defenses.
98. Who deemed holder in due course.

§ 90. Right of holder to sue; payment.—The holder of a negotiable instrument may sue thereon in his own name (*a*); and payment to him (*b*) in due course (*c*) discharges the instrument.

(*a*) This applies to a holder to whom the instrument is indorsed restrictively. See section 67 and note. Where the plaintiff is the payee, the production of the paper is sufficient. Tullis *v.* McClary, 128 Iowa, 493; Williams *v.* Holt, 170 Mass. 351. And where the instrument is payable to bearer, or, if payable to order, is indorsed in blank, possession is sufficient evidence of title on which to maintain the action. Newcombe *v.* Fox, 1 App. Div. 389; Weber *v.* Orton, 91 Mo. 680. The court will never inquire whether he sues for himself or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides.* Ellicott *v.* Martin, 6 Md. 509. And the *prima facie* case made in favor of the plaintiff by his possession of the instrument can not, in the absence of *mala fides,* be rebutted by evidence that the title was in some other party. (*Id.*) As a general rule possession by the attorney for a party is possession by the party himself. Kunkel *v.* Spooner, 9 Md. 462. But, of course, the indorsement must be proved; the mere introduction of the note, with the name written on the back, is not sufficient. Tyson *v.* Joyner, 139 N. C.

69. The mere possession by another than the payee, of an unindorsed negotiable note not payable to bearer, is not *prima facie* evidence of ownership. Shepard *v.* Hanson, 9 N. D. 249.

(*b*) The instrument can be satisfied only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money is not actually authorized the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. Marling *v.* Mommensen, 127 Wis. 363.

(*c*) The maker of a note, in order to avail himself of the defense of payment before maturity, must show that the indorsee had prior notice of the paymnt. Yenney *v.* Central City Bank, 44 Neb. 402. But where the instrument is indorsed "for collection," the payment to the indorser after the transfer is a good defense, even against a claim of prior beneficial ownership by the indorsee. Smith *v.* Bayer, 46 Ore. 143.

§ 91. **What constitutes a holder in due course.**—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face (*a*);

2. That he became the holder (*b*), of it before it was overdue (*c*), and without notice that it had been previously dishonored, if such was the fact;

3. That he took it in good faith and for value (*d*);

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it (*e*).

(*a*) To determine the character of an indorsee as a *bona fide* holder for value without notice, the point of time at which he parts with his money is the important fact. If the paper was then on its face irregular — out of the usual course of business — the effect of that knowledge on the indorsee could not be prevented by subsequently putting it in a regular shape. Losee *v.* Bissell, 76 Pa. St. 459, 462. The fact that the instrument is post-dated affords no cause of suspicion so as to put the transferee on inquiry. Brewster *v.* McCardel, 8 Wend. 478. As to incom-

plete instruments, and the authority to fill up blanks therein, see section 33.

(*b*) Under the statute the payee may be a holder in due course. Boston Steel & Iron Co. *v.* Steuer, 183 Mass. 140; Vander Ploeg *v.* Van Zuuk (Iowa), 112 N. W. Rep. 807. This is the rule at common law. See Watson *v.* Russell, 3 B. & S. 34; 5 B. & S. 968; Nelson *v.* Cowing, 6 Hill, 333, 339. Thus, the holder of a draft drawn by a bank on its correspondent may be deemed a holder in due course, though he is named therein as payee. Armstrong *v.* American Exchange National Bank, 133 U. S. 433. See note to section 33.

(*c*) McKim *v.* King, 58 Md. 502; Marsh *v.* Marshall, 53 Pa. St. 396; Davis *v.* Miller, 14 Gratt. 1; Cottrell *v.* Watkins, 89 Va. 801. At one time it was doubted whether the mere fact that a negotiable note was overdue at the time of the transfer was in itself sufficient to affect the title of the holder, and whether it was not necessary that there should be something on the face of the paper besides the day of payment to show that it had been actually dishonored. This doubt was expressed by Lord Kenyon in Brown *v.* Davies, 3 T. R. 80, decided in 1789; but Ashurst and Buller, J.J., were of opinion that the mere fact of its being overdue at the time of the transfer was sufficient to affect the title, and that one taking a note under such circumstances takes it upon the credit of the transferrer. Subsequently in Boehm *v.* Sterling, 7 T. R. 423-430, Lord Kenyon gave his assent to the rule thus laid down, and it has never since been questioned. A promissory note matures when, by its terms, the principal becomes due; and one who purchases it in good faith, for value, before maturity, is within the protection of the law merchant, although interest is overdue at the time of such purchase. Kelley *v.* Whitney, 45 Wis. 110. But see Hart *v.* Stickney, 41 Wis. 630; Newell *v.* Gregg, 51 Barb. 253. But a note payable by instalments is overdue when the first instalment is overdue and unpaid, and one who takes it afterward takes it subject to all equities between the original parties. Vinton *v.* King, 4 Allen, 562. A transfer upon the day of maturity is before the instrument is overdue; for the principal debtor has the whole of that day in which to pay. Continental Nat. Bank *v.* Townsend, 87 N. Y. 8. But see Sargent *v.* Southgate, 5 Pick. 312; Ayer *v.* Hutchins, 4 Mass. 370; Pine *v.* Smith, 11 Gray, 38. A check deposited with a bank on the day

of its date can not be considered as overdue when so deposited. Shawmut National Bank *v.* Manson, 168 Mass. 425. A check dated in a suburb of New York City June 1, 1900, was sent in the course of business to the State of Kansas, where it arrived on June 8, 1900, and was purchased by a Kansas bank in good faith and for value.—*Held,* that the check was not overdue to such an extent as to put the bank upon inquiry or raise any presumption that it knew of any defense existing between the original parties. Citizens' State Bank *v.* Cowles, 89 App. Div. (N. Y.) 281, reversed on other grounds in 180 N. Y. 340.

(*d*) Under this section, it is not sufficient to constitute a bank a holder in due course that it has discounted the paper and placed the proceeds to the credit of its customer. Albany County Bank *v.* People's Ice Co. 92 App. Div. (N. Y.) 47; Consolidation Nat. Bank *v.* Kirkland, 99 (*Id.*) 121; City Deposit Bank *v.* Green, 130 Iowa, 384; McKnight *v.* Parsons (Iowa), 113 N. W. Rep. 858; Elgin City Banking Co. *v.* Hall (Tenn.), 108 S. W. Rep. 1068. And merely crediting to a depositor's account, the amount of a check drawn upon another bank, where the account continues to be sufficient to pay the check in case it is dishonored, does not make the bank a holder of the check in due course within this section. Citizens' State Bank *v.* Cowles, 180 N. Y. 346. So, where the credit given by the bank is only provisional, Commercial Nat. Bank *v.* Citizens' State Bank, 132 Iowa, 706, 708, or the paper is received for collection only. Bank of America *v.* Waydell, 187 N. Y. 115. But if the bank incurs a liability by reason of the deposit, or where it obligates itself to honor a check, it is a holder for value. Montrose Savings Bank *v.* Claussen (Iowa), 114 N. W. Rep. 547. So, if the depositor was indebted to the bank. City Deposit Bank *v.* Green, 130 Iowa, 384. Thus, where a bank purchased a note and credited the proceeds to the seller's account, which was subject to check, being at times overdrawn, it was held that the bank was a holder for value, though on different dates, including the date of maturity, the seller had a balance in the bank exceeding the amount of the note. Northfield Nat. Bank *v.* Arndt (Wis.), 112 N. W. Rep. 451. So, where a bank discounted a note for the payee, who was indebted to the bank on a note due at that time and charged to the payee's account, and the account was made good by the application of the proceeds of the discount, it was held that the bank

was a holder for value under this section. Wallabout Bank *v.* Peyton, 123 App. Div. (N. Y.) 727. But where the avails of a discount are applied to an existing indebtedness, the bank must show that there was an agreement that they should be applied in payment and extinguishment thereof. Consolidation Nat. Bank *v.* Kirkland, 99 App. Div. (N. Y.) 121. If one purchases an accommodation note for cash and sells it to a *bona fide* purchaser in exchange for the purchaser's note, the latter may be a holder in due course within the meaning of the statute. Mehlinger *v.* Harriman, 185 Mass. 245. Where the payees give the usual written direction in accommodation notes, at the foot of the note, "credit the drawer," and the note is afterward discounted in bank, or found in the possession of any person not a party to the original transaction, the presumption is that the holder is a holder for value, and that the drawer received the proceeds according to the directions so given. Steckel *v.* Steckel, 28 Pa. St. 233, 235. As to what will constitute value, see section 51. *Prima facie* value is presumed. See section 50.

(*c*) As to what is necessary to constitute notice, see section 95.

§ 92. **When person not deemed holder in due course.**—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course (*a*).

(*a*) Under this section it has been held that a check issued on a certain date, and bearing that date and negotiated at noon of the following day, was not overdue so as to carry to an indorsee notice of its illegality or previous dishonor. Matlock *v.* Scheuerman (Ore.), 93 Pac. Rep. 823. So, a cashier's check issued May 18th, and indorsed five days later, was held to have been negotiated within a reasonable time. Singer Manufacturing Co. *v.* Summers, 143 N. C. 102. As to what is reasonable time will depend upon the facts of the particular case. See section 4. No absolute measure can be fixed. A day or two, Field *v.* Nickerson, 13 Mass. 131, 137; seven days, Thurston *v.* McKenn, 6 Mass. 428; and even a month, Ranger *v.* Cory, 1 Metc. 369, is not too long; while eight months, American Bank *v.* Jennes, 2 Metc. 288; Ayres *v.* Hutchins, 4 Mass. 370; Nevins *v.* Townsend, 6 Conn. 7; three months and a half, Stevens *v.* Brice, 21 Pick. 193; and even two

months and a half, Losee *v.* Durkin, 7 J. R. 70; Sice *v.* Cunningham, 1 Cowen, 397, 404, have been deemed sufficient to discredit a note. Coupons payable to bearer are, when overdue, subject to equities; they are not in this respect like bank notes. McKim *v.* King, 58 Md. 502.

§ 93. **Notice before full amount paid.**—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him (*a*).

(*a*) Dresser *v.* Missouri Etc. R. R. Construction Co., 93 U. S. 93. The case falls within the general rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser. (*Id.*) This section is merely declaratory of the law as it existed before the enactment of the statute. Albany County Bank *v.* People's Ice Co., 92 App. Div. (N. Y.) 47.

§ 94. **When title defective.**—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud, duress, or force and fear, (*a*) or other unlawful means, or for an illegal consideration, (*b*) or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud (*c*).

(*a*) Statute applied in German-American Bank *v.* Cunningham, 97 App. Div. (N. Y.) 244. Where a note was executed by several persons, and the signature of one of them was secured by fraudulent representations as to the character of the instrument, it was held that the note was void under this section. Aukland *v.* Arnold (Wis.), 111 N. W. Rep. 212. So, where signatures were secured to a note under a promise that the paper should not become a binding obligation until signed by certain other persons, and part of the other signatures were obtained

without a disclosure of the conditional character of the prior signatures, it was held that the latter were obtained by fraud. Hodge *v.* Smith, 130 Wis. 326. Commercial paper executed under duress is void, even though there may be some consideration to support it. Magoon *v.* Reber, 76 Wis. 392.

(*b*) Under this section the title of a person negotiating a note is defective where the only consideration was usury on a former note between the same parties. Keene *v.* Behan, 40 Wash. 505.

(*c*) The fraud in putting the paper into circulation must be a fraud against the defendant. Kinney *v.* Kruse, 28 Wis. 189. Thus, the fact that one who held possession of a note for the payee put it in circulation in fraud of his rights is no defense in a suit by the holder against the maker. (*Id.*) And where the fraud consists in the misapplication of the proceeds received for the paper it will not affect the paper in the hands of the holder, as he is not in any manner bound to look to their application, nor responsible for the misappropriation of them. Gray's Admr. *v.* Bank of Kentucky, 29 Pa. St. 365. There is no distinction between obtaining a note by fraud and fraudulently putting it in circulation. National Revere Bank *v.* Morse, 163 Mass. 381, 385. For a case applying this provision see Aukland *v.* Arnold, 131 Wis. 64.

§ 95. **What constitutes notice of defect.**—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith (*a*).

(*a*) The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he

may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide,* his title, according to settled doctrines, will prevail. Valley Savings Bank *v.* Mercer, 97 Md. 458, 479; Cheever *v.* Pittsburgh, Shenango & Lake Erie R. R. Co., 150 N. Y. 59, 65; American Exchange National Bank *v.* New York Belting, etc. Co., 148 N. Y. 705; Knox *v.* Eden Musee Am. Co., 148 N. Y. 454; Canajoharie National Bank *v.* Diefendorf, 123 N. Y. 202; Vosburgh *v.* Diefendorf, 119 N. Y. 357; Jarvis *v.* Manhattan Beach Co., 148 N. Y. 652; Murray *v.* Lardner, 2 Wall. 110; Swift *v.* Smith, 102 U. S. 442; Belmont *v.* Hoge, 35 N. Y. 65; Welsh *v.* Sage, 47 N. Y. 143; Nat. Bank of Republic *v.* Young, 41 N. J. Eq. 531; Fifth Ward Sav. Bank *v.* First Nat. Bank, 48 N. J. Law 513; Credit Company *v.* Howe Machine Co., 54 Conn. 357; Ladd *v.* Franklin, 37 Conn. 64; Croft's Appeal, 42 Conn. 154; Morton *v.* N. A. & Selma Ry. Co., 79 Ala. 590; Phelan *v.* Moss, 67 Pa. St. 59; Moorehead *v.* Gilmore, 77 Pa. St. 118; Second National Bank *v.* Morgan, 165 Pa. St. 199; Frank *v.* Lilienfeld, 33 Gratt. 377. And as the transferee is not bound to make inquiry, the fact that the transferer lives near him is not material. Seltzer *v.* Deal, 135 N. C. 428.

The payment of value is a circumstance to be taken into account, with other facts, in determining the good faith of the purchaser, but it is not conclusive. Cunningham *v.* Scott, 90 Hun, 410, 411; Tischler *v.* Schurman, 49 Misc. (N. Y.) 257. And while the mere fact that paper has been purchased at a discount will not, ordinarily, be evidence of bad faith, yet where the discount is very large, that circumstance may be considered, in connection with other facts, in determining the question of the purchaser's good faith. Williams *v.* Huntington, 68 Md. 590. But a bank is not chargeable with bad faith because it discounted notes at the rate of seven per cent. per annum when the legal rate of interest was but six per cent. Bank of Monongahela Valley *v.* Weston, 172 N. Y. 259. And the fact that a bank purchases a check, instead of receiving it on deposit for collection, is not such a deviation from the usual course of business as will justify a conclusion of bad faith on its part. Citizens' State Bank *v.* Cowles, 89 App. Div. (N. Y.) 281. Nor does it charge an indorsee with notice of an infirmity in a check that the payee, on transferring it, stated that the drawer had asked that it be held

for a few days before presentment for payment. Matlock *v.* Scheuerman (Ore.), 93 Pac. Rep. 825.

The mere fact that the holder for value of a promissory note made by a third party receives it from a person engaged in the note-brokerage business, as collateral security for a loan to such broker, is not sufficient to raise a doubt as to the authority of the broker to so deal with the note. American Ex. Nat. Bank *v.* New York Belting and Packing Company, 148 N. Y. 698. And a bank has a right to assume, as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it, and who is in the habit of borrowing money from it, that the customer is acting in good faith and within his lawful rights; and the fact that the customer is engaged in the business of note-brokerage is not enough to deprive the bank of the right to indulge in such assumption. (*Id.*) The fraudulent misappropriation by the broker of the proceeds of discount is not sufficient to put the holder to the proof of his *bona fides*. Sloan *v.* The Union Banking Company, 67 Pa. St. 470. And the fact that the transferee may know that the person from whom he receives the paper is "crooked" in business matters does not affect his title or make it his duty to inquire about the paper. Seltzer *v.* Deal, 135 N. C. 428. In the case last cited, the court said: "It would be almost impossible for the business of banking to be carried on if it was incumbent on bank officers, whenever negotiable paper was offered for discount or sale, to inquire into whether any of the parties to be charged were crooked in their business methods."

In Chemical Nat. Bank *v.* Kellogg (183 N. Y. 92, 96) it was said: "The only practicable rule is to make the face of the paper itself, when free from suspicion, sufficient evidence, in the absence of notice, against all who aided to put it into circulation in that condition, unless the note is void by the positive command of a statute, such as the act against usury. No other rule would work well, for it would be intolerable if every bank had to learn the true history of each piece of paper presented for discount before it could act in safety. It is better that there should be an occasional instance of hardship than to have doubt and distrust hamper a common method of making commercial exchanges." Accordingly, it was held in that case that a married woman who, for her husband's accommodation, had indorsed a note dated and payable in New York, was estopped from showing, as against a

New York bank which had discounted the paper in good faith, that the indorsement had been made in New Jersey, where her contract was void.

One who receives the notes of a corporation from one of its officers in payment of, or as security for, a personal debt of such officer does so at his peril. *Prima facie* the act is unlawful, and unless actually authorized, the purchaser will be deemed to have taken them with a notice of the rights of the corporation. Wilson *v.* Metropolitan Ry. Co., 120 N. Y. 145, 150. And where the maker of a note, which is payable to his order, and purports to be indorsed by a corporation, procures it to be discounted for his own benefit, this of itself, if unexplained, is notice that the indorsement is not made in the usual course of business, but is for the accommodation of the maker. National Park Bank *v.* German-American Mutual Warehousing and Security Company, 116 N. Y. 281. But the mere fact that the payee of a promissory note, made by a corporation, is a director of such corporation, is not notice to a transferee of any infirmity in the paper, nor is it sufficient to put him upon inquiry concerning the circumstances under which it was issued; and the rule applicable to notes made by officers of a corporation to their own order and used to pay their individual obligations, has no application to notes made by duly authorized officers payable to a director. Orr *v.* South Amboy Terra Cotta Co., 113 App. Div. (N. Y.) 103.

§ 96. **Rights of holder in due course.**—A holder in due course holds the instrument free from any defect of title (*a*) of prior parties and free from defenses available to prior parties among themselves, (*b*) and may enforce payment of the instrument for the full amount thereof (*c*) against all parties liable thereon.

(*a*) Under this section, a holder in due course of a promissory note payable to bearer can acquire a good title to the note from one who has stolen it. Massachusetts Nat. Bank *v.* Snow, 187 Mass. 160.

(*b*) One of the most important questions that has arisen under the statute is whether a holder in due course may recover upon paper void as between the immediate parties because given in

violation of some statute, as, for example, where the instrument is given for a gambling debt, or is tainted with usury. In Wirt *v.* Stubblefield, 17 App. Cas. D. C. 283, it was held that under the Negotiable Instruments Law a *bona fide* holder may enforce a promissory note against the maker, even though the note was given for a gambling debt, and that this statute has repealed the statutes of 16 Car. 2 Ch. 7 and 9 Anne, Ch. 14, which were in force in the District of Columbia. In the course of the opinion it was said by Alvey, C. J.: "We know, moreover, that the great and leading object of the act, not only with Congress, but with the large number of the principal commercial States of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute, was to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute, as against the original maker or acceptor, as is the case by the operation, indeed, by the express provision, of the statutes of Charles and Anne."

And in the late case of Schlesinger *v.* Lehmaier (191 N. Y. 69) the Court of Appeals of New York held that the provisions of the State Banking Law on the subject of usury are to be construed in connection with section 96 of the Negotiable Instruments Law, and that a bank which had purchased paper infected with usury, could not recover on the same without showing that it became a holder in due course. The court said: "It pertains to negotiable instruments, and should be construed in connection with the other legislation upon the same subject. In the Negotiable Instruments Law it is expressly provided that a holder, who becomes such before maturity in good faith and for value without notice of any infirmity, holds the same 'free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce the payment of the instru-

ment for the full amount thereof against all parties liable thereon.' Here we have the legislative intent expressed in clear and unmistakable language. It establishes a just and proper rule which protects the bank in making purchases of commercial paper in good faith before maturity, for value and without notice of infirmity. But where it purchases with actual knowledge of the infirmity or defect or knowledge of such facts that its action in taking the instrument amounted to bad faith, it is not protected." See also Schlesinger *v.* Gilhooly, 189 N. Y. 1, 34; Schlesinger *v.* Kelly, 114 App. Div. (N. Y.) 546, 552–555; Broadway Trust Co. *v.* Manheimer, 47 Misc. (N. Y.) 465.

But, on the other hand, it has been held in Kentucky that this section applies only to paper that might have been obligatory between the parties to it, and that hence a holder in due course cannot recover upon a note given for a gambling debt, or given in violation of the statute respecting "peddlers' notes." Alexander *v.* Hazelrigg, 97 S. W. Rep. 353; Lawson *v.* First Nat. Bank, 102 S. W. Rep. 324. In the case first cited, the court said: "It has been the policy of this State to suppress gaming, and the statutes making gaming contracts void were founded upon what the Legislature has for many years deemed to be sound public policy. It is not conceivable that the General Assembly, in the passage of the Act of 1904 for the protection of innocent holders of negotiable instruments, intended to or did repeal section 1955, Ky. St. 1903, which declares all gaming contracts void. In our opinion, the disappointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the State as the removal of the ban from gaming contracts." And in the other Kentucky case cited it was said: "The negotiable instruments statute is a most comprehensive piece of legislation. It goes into minutest detail in dealing with the subjects embraced by it. The whole scope of it is shown to be the dealing with commercial paper, so as to protect innocent purchasers of such against mere defenses available as between the original parties. It gives such paper currency, free from original defenses. But it applies only to paper that might have been obligatory between the parties. But, where the parties were never bound because the law made the note void, as contrary to public policy as expressed in the statutes, the negotiable instruments act does not apply, and ought not to. The prevention

of crime is of more importance than the fostering of commerce. The later act should be read in view of its purpose, and not as intending to repeal other statutes passed in the exercise of the police power of the State to suppress crime and fraud."

The subject is one, perhaps, upon which the courts will never agree; for they will construe the section with reference to the policy of their respective States. In some States, the requirements of commerce will be the controlling consideration; in others, the protection of the weak and the ignorant. The modern view is admirably expressed in Chemical Nat. Bank *v.* Kellogg (183 N. Y. 92), where it was said by Vann, J.: "The business of the country is done so largely by means of commercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the State, for it tends to derange trade and hinder the transaction of business." And it is plain that if a negotiable instrument is to be void in the hands of a holder in due course, because it was given for a usurious loan, or for a gambling debt, or to a "peddler," or for the price of a stallion, or for a lightning-rod, it is not merely that instrument alone that is affected, but a doubt is cast upon all commercial paper originating in that community. For other cases applying local statutes, see Quiggle *v.* Herman, 131 Wis. 379 (note given for a stallion), Arndt *v.* Sjoblom, 131 Wis. 642 (note given for lightning-rods) National Bank of Commerce *v.* Pick, 13 N. D. 74 (note given to foreign corporation having no State license), Sullivan *v.* German Nat. Bank, 18 Colo. App. 99 (certificate of deposit transferred for gambling debt), Gordon *v.* Levine, 194 Mass. 418 (note made on Sunday).

(*c*) This is the rule of the Supreme Court of the United States. Cromwell *v.* County of Sac, 96 U. S. 60. There is considerable conflict in the decisions of the State courts. In the case cited the Supreme Court said: "We are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that

the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities and those of private corporations are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes a loan upon such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured." See also Birrell *v.* Dickerson, 64 Conn. 61; Rowland *v.* Fowler, 47 Conn. 349; Williams *v.* Huntington, 68 Md. 590; Moore *v.* Baird, 30 Pa. 136. The statute changes the rule in New York. Harger *v.* Wilson, 63 Barb. 237; Huff *v.* Wagner, 63 Barb. 230; Todd *v.* Shelbourne, 8 Hun, 512. See also Holcomb *v.* Wyckoff, 35 N. J. Law 38; Bramhall *v.* Atlantic National Bank, 36 N. J. Law 243; Oppenheimer *v.* Farmers' and Mechanics' Bank, 97 Tenn. 19. Under this section, a *bona fide* purchaser of a note and mortgage, is not limited to a recovery of the amount paid therefor, but is entitled to enforce the same for the full amount due thereon, even though the execution of the note was induced by fraud, and it was bought at a heavy discount. Lassas *v.* McCarty, 47 Ore. 474. As to amount of recovery where instrument taken as collateral security, see section 53. For cases where the purchaser has paid only part of the amount agreed to be paid before receiving notice, see section 93.

§ 97. **When subject to original defenses.**— In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable (*a*). But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has

all the rights of such former holder in respect of all parties prior to the latter (*b*).

(*a*) It was not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various States relating to set-off and counter-claim. In an act designed to be uniform in the various States, no more can be done than fix the rights of holders in due course. On the question whether only such equities may be asserted as attach to the paper, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In England it was decided in Burroughs *v.* Moss, 10 Barn. & Cress. 558, that the indorsee of an overdue bill is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters, such as a general set-off is. This is a leading case, and has since been uniformly followed in that country. Stein *v.* Yglesias, 1 Crom. Mees. & Ros. 565; Whitehead *v.* Walker, 10 Mees. & Welsb. 696. See also Hughes *v.* Large, 2 Pa. St. 103; Long *v.* Rhawn, 75 Pa. St. 128; Young *v.* Shriner, 80 Pa. St. 463; Davis *v.* Miller, 14 Gratt. 1; Kilcrease *v.* White, 6 Fla. 45; Cumberland Bank *v.* Haun., 3 Harrison, 223; Chandler *v.* Drew, 6 N. H. 469; Robertson *v.* Breedlone, 7 Porter, 541; Tuscumbia, Etc., R. R. Co. *et al. v.* Rhodes, 8 Ala. 206-224; Robinson *v.* Lymon, 10 Conn. 31; Steadman *v.* Jilman, *Id.*, 56; Adair *v.* Lenox, 15 Oregon, 489. A person to whom the instrument is transferred as a gift takes it subject to all equities then existing between the original parties, but not subject to those which arise thereafter. First Nat. Bank of Champlain *v.* Wood, 128 N. Y. 35; Baxter *v.* Little, 6 Met. 7.

(*b*) Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities its character as an available security is established, and its holder can transfer it to others with the like immunity. Cover *v.* Myers, 75 Md. 406; Black *v.* First National Bank of Westminster, 96 Md. 399. The principle is, that the promise being good to the prior indorsee or holder, free from objection on the ground of fraudulent or illegal consideration, he has the power of transferring it to others, with the same immunity, as an incident to the legal right which he had

acquired in the instrument. Kinney *v.* Kruse, 28 Wis. 183, 190-191. See also Boyd *v.* McCann, 10 Md. 118. Thus, if A gives to B his note, and C becomes the holder thereof in due course, any subsequent holder could stand on C's title and enforce the note against A, though before taking the same he had notice of a defense which A had to the note as against B. But if, in the case supposed, the note should be indorsed by C to D, and by the latter to E, and by him to F, under circumstances which would give D a defense as a party thereto, then if F had notice of the equities of both A and D he could enforce the note against A, but not against D.

§ 98. **Who deemed holder in due course.**— Every holder is deemed *prima facie* to be a holder in due course (*a*); but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course (*b*). But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title (*c*).

(*a*) It is not necessary for the holder to offer in the first instance any proof that he is an innocent purchaser. Kerr *v.* Anderson, N. D. 111, N. W. Rep. 614. The presumption is that he received it *bona fide* and for value. Gray's Admr. *v.* Bank of Kentucky, 29 Pa. St. 365; Wilson *v.* Lazier, 11 Gratt. 477.

(*b*) Statute applied in German Am. Bank *v.* Cunningham, 97 App. Div (N Y.) 244; Mitchell *v.* Baldwin, 88 (*Id.*) 265, 269; Hodge *v.* Smith, 130 Wis. 326; Singer Manufacturing Co. *v.* Summers, 143 N. C. 102; McKnight *v.* Parsons (Iowa), 113 N. W. Rep. 858; Roviez *v.* Nichells, 9 N. D. 536; Regester's Sons Co. *v.* Reed, 185 Mass. 226, 227; Cook *v.* Am. Tubing & Webbing Co. (R. I.) 65 Atl Rep. 641; Keene *v.* Behan, 40 Wash. 505; Kerr *v.* Anderson (N. D.), 111 N. W. Rep. 614. The holder may make out his title by presumption until it is impeached by evidence showing the paper had a fraudulent or illegal inception. When this is done he can no longer rest upon presumption, but

it is incumbent upon him to show the circumstances under which it came into his possession, and that he has acted in good faith. Canajoharie National Bank *v.* Diefendorf, 123 N. Y. 191; Joy *v.* Diefendorf, 130 N. Y. 6; Jordan *v.* Grover, 99 Cal. 194; Market and Fulton Nat. Bank *v.* Sargent, 85 Me. 349; Haines *v.* Merrill, 56 N. J. Law, 312; Sullivan *v.* Langley, 120 Mass. 437; Merchants' National Bank *v.* Haverhill Iron Works, 159 Mass. 158; Conant *v.* Johnston, 165 Mass. 450, 452; National Revere Bank *v.* Morse, 163 Mass. 381, 385; Williams *v.* Huntington, 68 Md. 590; Griffith *v.* Shipley, 74 Md. 591; Ellicott *v.* Martin, 6 Md. 509; Hutchinson *v.* Boggs & Kirk, 28 Pa. St. 294; Wilson *v.* Lazier, 11 Gratt. 477; Vathir *v.* Zane, 6 Gratt. 246. The statute requires the holder to show affirmatively the facts constituting good faith upon his part; and it is not sufficient for him to prove that he acquired the note before maturity for value. Keene *v.* Behan, 40 Wash. 505. And where the plaintiff seeks to establish this by his own testimony, the credibility of such testimony, though it is undisputed, is for the jury. Jay *v.* Diefendorf, *supra.* Where negotiable securities have been stolen and negotiated, the burden is upon the holder to show that he is himself a holder in due course, or that he claims under such a holder; and there is no presumption that the thief negotiated the securities before they became due. Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221; Hinckley *v.* Merchants' Nat. Bank, 131 Mass. 147.

The rule adopted in the statute was the one which prevailed in New York and many other States. The rule which obtains in the Federal Courts imposes upon the defendant the burden of proving bad faith. First Nat. Bank *v.* Moore, 148 Fed. Rep. 953, 957; Murray *v.* Lardner, 2 Wall. 110; Hotchkiss *v.* National Bank, 21 Wall. 354; Collins *v.* Gilbert, 94 U. S. 753; King *v.* Doane, 139 U. S. 166. Where an inference may be drawn from the surrounding circumstances that on the one hand tends to discredit plaintiff's testimony as to his lack of knowledge concerning the infirmity in the paper and his good faith in taking it, and on the other hand tends to establish lack of good faith, the question is for the jury. Matlock *v.* Scheuerman (Ore.), 93 Pac. Rep. 823; McKnight *v.* Parsons (Iowa), 113 N. W. Rep. 858; M. Groh's Son's Co. *v.* Schneider, 34 Misc. (N. Y.) 195. Under this section an instruction that the burden is on the holder to show "that some person under whom he claims acquired the title in good

faith" is erroneous. Hawkins *v.* Young (Iowa), 114 N. W. Rep. 1041. That the payee is described as "trustee" does not let in defenses against a *bona fide* holder for value. Bank *v.* Looney, 99 Tenn. 278.

(*c*) The last sentence is necessary to qualify the general statement. If A issues his note to B, and C gets possession of it and fraudulently negotiates it to D, the fraud of C in nowise affects A, and is no defense to him when sued on the instrument by D. Thus, it has been held that the fact that one who held possession of a note for the payee puts it in circulation in fraud of his rights is no defense in a suit by the holder against the maker; nor does it change the burden of proof, so as to require the plaintiff to show in the first instance that he is a *bona fide* holder for value. Kinney *v.* Kruse, 28 Wis. 183.

ARTICLE VI.

Liability of Parties.

Section 110. Liability of maker.
111. Liability of drawer.
112. Liability of acceptor.
113. When person deemed indorser.
114. Liability of irregular indorser.
115. Warranty; where negotiation by delivery, et cetera.
116. Liability of general indorsers.
117. Liability of indorser where paper negotiable by delivery.
118. Order in which indorsers are liable.
119. Liability of agent or broker.

§ 110. **Liability of maker.**—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor (*a*); and admits the existence of the payee and his then capacity to indorse (*b*).

(*a*) An indorsee of a promissory note cannot maintain a joint action against the ten makers of the note, where the note on its face states that the liability of each of the makers is limited to one-tenth of the amount of the note. National Bank of Phœnixville *v.* Buckwalter, 214 Pa. St. 289. The fact that the holder had other collateral securities for the same debt more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defense on the part of the maker. Lord *v.* Ocean Bank, 20 Pa. St. 384.

(*b*) If the payee is a fictitious or non-existing person the instrument is payable to bearer. Section 9. Where the name of the payee is a trade or assumed name, and the instrument is issued for value, the maker is estopped from setting up that the instru-

ment is payable to a fictitious payee, if by such averment the instrument would be defeated. Jones *v.* Home Furnishing Co., 9 App. Div. (N. Y.) 103.

§ 111. **Liability of drawer.**—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and* paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

§ 112. **Liability of acceptor.**— The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance (*a*); and admits:

1. The existence of the drawer, the genuineness of his signature (*b*), and his capacity (*c*) and authority (*d*) to draw the instrument; and

2. The existence of the payee and his then capacity to indorse (*e*).

(*a*) The discounting of a bill by the drawee who has not accepted it is neither payment nor a promise to pay according to its tenor and effect, but puts him in the position of an indorsee for value, with right of action against drawer and indorser. Swope *v.* Ross, 40 Pa. St. 186.

(*b*) National Park Bank *v.* Ninth National Bank, 46 N. Y. 77; Marine National Bank *v.* National City Bank, 59 N. Y. 67; Bank of St. Albans *v.* Farmers' and Mechanics' Bank, 10 Vt. 141; Bank of U. S. *v.* Bank of Georgia, 10 Wheat. 333. In Pennsylvania this

* Error in engrossing. The word in the Commissioners' draft is "or." The mistake was not corrected by Laws N. Y. 1898, c. 336. It occurs only in the New York statute.

matter was formerly regulated by the statute of 1849. The effect of that statute and the cases upon the subject was that the mere acceptance or payment of forged paper was no longer of itself a bar to the recovery of the money by the party paying, nor was such party absolutely bound to discover and give notice of the forgery on the very day of payment. All that he need do in any case was to give ample notice promptly according to the circumstances and the usage of the business, and unless the position of the party receiving the money had been altered for the worse in the meantime the date of the notice was not material. Iron City Nat. Bank *v.* Fort Pitt Nat. Bank, 159 Pa. St. 46, 52. As to other cases on this subject see People's Bank *v.* Franklin Bank, 88 Tenn. 299; First Nat. Bank of Danvers *v.* First Nat. Bank of Salem, 151 Mass. 280; Nat. Bank of North America *v.* Bangs, 106 Mass. 441; Ellis *v.* Insurance Company, 4 Ohio St. 268; First Nat. Bank *v.* Ricker, 71 Ill. 439; Rouvant *v.* San Antonio Nat. Bank, 63 Tex. 610; Deposit Bank of Georgetown *v.* Fayette Nat. Bank, 90 Ky. 10. Acceptance admits the signature of the drawer, but is no proof or admission of the indorsement by the payee, whether the bill be payable to the drawer's own order or that of another person. Williams *v.* Drexel, 14 Md. 566. And the drawee is not presumed to know the handwriting in the body of the instrument. Continental Nat. Bank *v.* Tradesman's Bank, 36 App. Div. (N. Y.) 112; Gunston *v.* Heat and Power Co., 181 Pa. St. 327.

(*c*) Thus, if the bill is drawn by a corporation, he cannot set up as a defense that it was without legal capacity to draw the bill. Halifax *v.* Lyle, 3 Welsby, H. & G. 446. So, if the bill is drawn by an infant, Jones *v.* Darch, 4 Price, 300; Taylor *v.* Croker, 4 Esp. 187; or a married woman, Cowton *v.* Wickersham, 54 Pa. St. 302.

(*d*) The delivery of a bill or check by one person to another for value implies a representation on the part of the drawer that the drawee is in funds for its payment, and the subsequent acceptance of such check or bill constitutes an admission of the truth of the representation, which the drawer is not allowed to retract. By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer, and an extension of credit by his admission, is not afterward at liberty to controvert the fact as against a

bona fide holder for value of the bill. Heuertematte *v.* Morris, 101 N. Y. 63, 70. If the acceptance be for the drawer's accommodation the acceptor does not thereby become entitled to sue the drawer upon the bill; but when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received. Christian *v.* Keen, 80 Va. 369, 377. See also Whitwell *v.* Brigham, 19 Pick. 117; Henderson *v.* Thornton, 37 Miss. 448; Suydam *v.* Combs, 3 Green (N. J.), 133.

(*e*) Thus, he would not be permitted to show that the payee at the time of the acceptance was a lunatic. Smith *v.* Marsack, 6 C. B. 486.

§ 113. **When person deemed indorser.**—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity (*a*).

(*a*) See section 36, subdivision 6, and note. There is nothing in either section to preclude a party from assuming liability such as guarantor, etc. Thus, if he were to place above his signature the words, "I guarantee the payment of the within note," he would not be deemed an indorser but a guarantor. Where the statute fixes the status of a party to a negotiable instrument as being that of an indorser, parol evidence is not admissible to vary such status. Baumeister *v.* Kuntz, 42 So. 886 (Fla.). Under this section a partner, by individually indorsing a firm note adds to his liability as maker a several and distinct liability as indorser. Nat. Exchange Bank *v.* Lubrano (R. I.), 68 Atl. Rep. 944. See note to section 114.

§ 114. **Liability of irregular indorser.**—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

This section is intended to cover irregular indorsements. On this subject the decisions are very conflicting. In some jurisdictions a person placing his signature on the back of a note before the payee has indorsed was deemed a joint maker. Good *v.* Martin, 95 U. S. 93; National Exchange Bank *v.* Cumberland Lumber Co., 100 Tenn. 479; Logan *v.* Ogden, 101 Tenn. 392; Bank of Jamaica *v.* Jefferson, 92 Tenn. 537; Melton *v.* Brown, 25 Fla. 461; Schroeder *v.* Turner, 68 Md. 506. In other jurisdictions he was regarded as a guarantor. In still others he was considered an indorser. And those courts which held him to be an indorser differed as to whether he was a first or second indorser. The rule adopted in the statute is embodied in part in section 3117 of the Civil Code of California, which reads: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon, as an indorser." The California rule was adopted because it is conducive to certainty, and because it appears to accord more nearly with what must have been the intention of the parties. When a plain man puts his signature on the back of a negotiable instrument he ordinarily understands that he is becoming liable as an indorser; and if he puts it there before the instrument is delivered, he usually does so for the purpose of giving the maker or drawer credit with the payee or other person to whom it is negotiated. The following observation in Connors *v.* Taylor (13 Wis. 224, 229), seems to embody much practical good sense: "Obviously, a person indorsing a note before delivery thereof to the payee intends rendering himself liable to the payee in some character and upon some ground. He must intend and design to secure its payment and give credit to the paper by placing his name upon it, even in the hands of the payee." In many of the cases the reasoning is highly technical, and the decisions are based upon considerations which, in all probability, never entered the heads of the parties themselves. The California Code makes no provision for a case where the

instrument is drawn to the order of the maker or drawer. This is covered by subdivision 2, above. Subdivision 3 was added to provide for a case where, the payee being unable to enforce payment, there might be a question whether the indorser would be liable to a person claiming under the payee.

In New York prior to the statute a person indorsing in blank before delivery to the payee was *prima facie* deemed to be a second indorser, and hence not liable to the payee, who was supposed to be the first indorser. Bacon *v.* Burnham, 37 N. Y. 614; Phelps *v.* Vischer, 50 N. Y. 69. The same rule prevailed in Pennsylvania. Eilbert *v.* Finkbeiner, 68 Pa. St. 243; Central Nat. Bank *v.* Dreydoppel, 134 Pa. St. 499. And in Oregon. Deering *v.* Creighton, 19 Oregon, 118; Cogswell *v.* Hayden, 5 Oregon, 22. But as the paper itself furnished only *prima facie* evidence of this intention, it was competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee. Coulter *v.* Richmond, 59 N. Y. 478. As the statute declares the liability to be that of an indorser, the holder is not permitted to show that the party so signing meant to be bound as guarantor. A. B. Farquhar Co. *v.* Highman (N. D.), 112 N. W. Rep. 558. The statute has changed the law in New York, New Jersey, Rhode Island, Ohio, and other States. Far Rockaway Bank *v.* Norton, 186 N. Y. 484; Haddock, Blanchard & Co. Inc. *v.* Haddock, 118 App. Div. (N. Y.) 412; Wilson *v.* Hendee (N. J.), 66 Atl. Rep. 413; Hibbs *v.* Guaraglia (N. J.), 67 Atl. Rep. 81; Rockfield *v.* First Nat. Bank of Springfield (Ohio), 83 N. E. Rep. 392; Dealy *v.* Choquet (R. I.), 67 Atl. Rep. 421. And now, where it is sought to hold an irregular indorser, demand and notice of dishonor must be shown as in other instances. See cases cited above.

This section does not, however, fix the rights of the various indorsers as between themselves; the latter liability is governed by section 118, under which evidence is admissible to show an agreement as to the order in which they shall be liable. Haddock, Blanchard & Co. Inc. *v.* Haddock, 118 App. Div. (N. Y.) 412; Kohn *v.* Consolidated Butter & Egg Co., 30 Misc. (N. Y.) 725; Wilson *v.* Hendee (N. J.), 66 Atl. Rep. 413. In the case last cited, it was said by the Court of Errors and Appeals of New Jersey: "It will be observed that this section deals with the rights of the payee and subsequent parties, and has not

the effect of defining the rights and liabilities of several irregular indorsers as between themselves. These are set forth in section 68, which reads as follows: 'As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they had agreed otherwise,' etc. This does not, by express mention, sanction parol evidence; neither does it expressly exclude any kind of evidence, whether written or verbal. Is parol evidence excluded by implication? If the legislative design was to admit only written evidence for the purpose indicated, it would have been unnecessary to say anything upon the subject, for by the common-law rules of evidence other writings explanatory of the real agreement would, of course, have been admissible. When we recall that a previous section had brought irregular and regular indorsers into a single category in the absence of an expressed intention to the contrary, that the first clause of section 68 renders the mere act of indorsement only *prima facie* evidence of the contract as between successive indorsers, and that by previous decisions parol evidence as between irregular indorsers was for all purposes admissible, and as between regular indorsers was for some purposes admissible and for other purposes not, it is easy to arrive at the conclusion that the section was intended to admit parol evidence in all cases between indorsers for the purpose of showing what was the agreement amongst themselves. This view brings our State into accord with the rule already laid down in some other jurisdictions as the common-law rule. At the same time it does not destroy the value of the instrument as a commercial instrument, for it is not against those who subsequently take the instrument in the course of commerce that the explanatory evidence is admitted. When we remember that the rules of the law merchant in this regard were established especially for the protection of subsequent holders of the instrument, and that the liability of indorser arises not from any words expressed upon the paper but from implications that originated in the necessities of trade and commerce, it is reasonable to attribute to the Legislature an intent to leave the paper open to explanation by parol as between the indorsers themselves." Wilson *v.* Hendee (N. J.), 66 Atl. Rep. 413, 416.

So, in Haddock, Blanchard & Co. Inc. *v.* Haddock, 118 App. Div. (N. Y.) 412, it was said: "The section does not purport to define the liability of one indorser to another. That matter is governed entirely by section 118. The two sections read well together, one as showing the position of the parties while the paper is with the public as a negotiable instrument; the other as defining the rights of the indorsers as between themselves where the negotiable character of the instrument is unimportant." And it has been held that under this section an indorser who signed for the accommodation of the maker, before the paper was indorsed by the payee, may defend upon the ground of invalidity, or want of consideration, in the same way that the maker could do, if the action were against him. Leonard *v.* Draper, 187 Mass. 536.

ILLUSTRATIONS.

Note made by A payable to order of B, indorsed by C, and afterward delivered to B. C is liable as indorser to B.

Note made by A payable to order of himself, indorsed by B, and afterward delivered to C. B is liable as indorser to C.

Note made by A to order of B, indorsed by C before B, but for accommodation of B, and discounted by Bank of X. C is liable as indorser to Bank of X and not to B.

§ 115. **Warranty where negotiation by delivery, et cetera.** — Every person negotiating an instrument by delivery or by a qualified indorsement, warrants (*a*):

1. That the instrument is genuine (*b*) and in all respects what it purports to be (*c*);

2. That he has a good title to it (*d*);

3. That all prior parties had capacity to contract (*e*);

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless (*f*).

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this

section do not apply to persons negotiating public or corporate securities, other than bills and notes (*g*).

(*a*) This, of course, refers only to the implied warranty. An express warranty may be so framed as to exclude all other warranties which would otherwise be implied by the law. Giffert *v.* West, 37 Wis. 115.

(*b*) Littauer *v.* Goldman, 72 N. Y. 506; Whitney *v.* National Bank of Potsdam, 45 N. Y. 303; Herrick *v.* Whitney, 15 Johns. 240; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Coolidge *v.* Brigham, 5 Mete. 68. But if at the time of the transfer he expressly decline to warrant the genuineness of the instrument no such warranty will be implied. Bell *v.* Dagg, 60 N. Y. 528. But a general refusal to guarantee will not of itself exclude the implied warranty of genuineness. (*Id.*) The sale and transfer, for a full and fair price, of a note past due, indorsed in blank by the person to whose order it is payable, implies a warranty by the vendor that such indorsement is valid. Giffert *v.* West, 37 Wis. 115. See next section.

(*c*) It will be noted that the warranty mentioned in the next section, that the instrument is valid, is omitted from this section. The inference from such omission is, that a person negotiating commercial paper by delivery merely, or by a qualified indorsement, does not warrant that it is an enforcible contract, as, for example, that it is not void for usury. This was the New York rule (Littauer *v.* Goldman, 72 N. Y. 506), and while it has been criticized and disapproved by the Supreme Court of the United States (Meyer *v.* Richards, 163 U. S. 385) it seems to be the more convenient rule in practice. The contrary rule would often work great hardship, and would make the business of dealing in commercial paper extremely hazardous. A broker, for example, buying and selling notes and bills, may assure himself that an instrument is genuine, and that the parties had capacity to contract, but he could not always know the circumstances under which the paper was made. On the other hand, the New York rule which is conceived to be the rule of the statute, does no injury to the purchaser; for if he desires a warranty, he has only to exact it, or to require the indorsement of the seller (see sec. 117).

(*d*) Meriden National Bank *v.* Gallaudet, 120 N. Y. 298, 303.

(*e*) Littauer *v.* Goldman, 72 N. Y. 506, 509.

(*f*) Thus, if he has knowledge that the paper is void for usury, he will be liable to the purchaser. Littauer *v.* Goldman, 72 N. Y. 506. But in such case *scienter* must be alleged and proved. (*Id.*) Compare Meyer *v.* Richards, 163 U. S. 385; Wood *v.* Sheldon, 42 N. J. Law, 425.

(*g*) Otis *v.* Cullum, 92 U. S. 448. This was an action against the vendor of municipal bonds payable to bearer, which were afterward declared void because the legislature had no power to pass the acts under which they were issued. It was held that no recovery could be had in the absence of an express warranty. The application of the rule of commercial paper in such cases would work great hardship and much public inconvenience.

§ 116. **Liability of general indorser.**—Every indorser who indorses without qualification, (*a*) warrants to all subsequent holders (*b*) in due course:

1. The matter and things mentioned in subdivisions one, two and three of the next preceding section (*c*); and

2. That the instrument is at the time of his indorsement valid and subsisting (*d*).

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor (*e*), and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it (*f*).

(*a*) As this and the preceding section include the case of *every* indorser, the warranty as to genuineness will apply to one to whom the paper has been indorsed restrictively, as for example, where the indorsement is "for collection." This undoubtedly changes the law; for the former rule was that the indorsement of a bank to which paper had been indorsed "for collection" did not import a guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal as stated upon the face of the paper; and it was held that, in such a case, the collecting bank was not liable after it had paid the proceeds to its principal, though a prior indorsement was a forgery. United

States *v.* American Exchange Nat. Bank, 70 Fed. Rep. 232; Nat. Park Bank *v.* Seaboard Nat. Bank, 114 N. Y. 28. But this rule was exceedingly inconvenient in practice, and hence it was deemed expedient to make every indorser a warrantor of genuineness. There is no hardship in this rule, for each indorser has a right of recourse against all prior parties. The former rule, however, introduced such an element of uncertainty that the clearing-house associations throughout the country adopted rules to obviate its effects, and the bankers sent letters to their customers requesting that they discontinue the use of the indorsement "for deposit," "for collection," etc. In this, as in several other instances where the law was changed, the needs of the business community were deemed of more importance than technical principles.

(*b*) Under this section, as under the rule of the law merchant, the warranty is in favor of *subsequent holders* only, and since the adoption of the statute, as well as before, the indorser does not warrant to the drawee that the signature of the drawer is genuine. Farmers' and Merchants' Bank *v.* Bank of Rutherford, 115 Tenn. 64, 70–71. Thus, if a check purporting to be drawn by A should be indorsed by B and cashed by C, the indorsement of B would be a warranty in favor of C, but not in favor of the bank on which the check is drawn.

(*c*) Leonard *v.* Draper, 187 Mass. 536. This is so, though he is an accommodation indorser, and the fact was known to the holder when he took the instrument. Packard *v.* Windholz, 88 App. Div. (N. Y.) 365, aff'd 180 N. Y. 549; Oriental Bank *v.* Gallo, 112 App. Div. 360. The provision of the statute refers to the condition of the instrument on leaving the hands of the indorser, and hence, if the paper should be altered after that time, and before delivery, there is no warranty. First Nat. Bank *v.* Gridley, 112 App. Div. (N. Y.) 398. Thus, where a note payable to the order of several payees jointly, was indorsed by one of them, and forwarded by mail to the maker, who, before negotiating the instrument, erased the word "jointly," and struck out the name of one of the payees, and inserted his own in place thereof, it was held that the indorser was not liable. (*Id.*) The indorsement of a promissory note is a guaranty by the indorser to the indorsee that the prior indorsements on the note and the signature of the payor are genuine, and made by parties author-

ized to pass the title. McConeghy *v.* Kirk, 68 Pa. St. 200; Condon *v.* Pearce, 43 Md. 83; Lambert *v.* Pack, 1 Salk. 127; Critchlow *v.* Parry, 2 Camp. 182; Prescott Bank *v.* Caverly, 7 Gray, 216, 220. Thus one who indorses a promissory note, purporting to be executed by a firm, thereby impliedly contracts that the note was made by the firm in whose name it is executed, and he cannot dispute the fact in an action upon the indorsement. Dalrymple *v.* Hillenbrand, 62 N. Y. 5 And a second indorser cannot dispute the legal capacity of the payee to indorse on the ground that she was a married woman. Prescott Bank *v.* Caverly, 7 Gray, 216, 217. So, one indorsing the note of a corporation admits its capacity to execute the note. Glidden *v.* Chamberlin, 167 Mass. 486. But see Southern Loan Co. *v.* Morris, 2 Pa. St. 175.

(*d*) Thus, whether a promissory note made on the Lord's Day can be enforced by a payee against the maker is immaterial in a suit by the indorsee against the indorser, as the latter always warrants the existence and legality of the contract which he undertakes to assign. Prescott National Bank *v.* Butler, 157 Mass. 548.

(*e*) An indorser of a promissory note which contains a stipulation for a reasonable attorney's fee in case of suit is as much liable for the attorney's fee as for the principal of the note. Benn *v.* Kutzschan, 24 Ore. 28. See section 21.

(*f*) The indorser has no right to require the holder to sue the maker or drawer, under the penalty of the indorser being discharged in case of non-compliance; and it is his duty to take up the note. Day *v.* Ridgway, 17 Pa. St. 303. Nor is the holder bound to anticipate and make provision for a breach of the contract. Bartlett *v.* Isbell, 31 Conn. 297. Parol evidence of an agreement which would vary the legal liability of the indorser under his indorsement is inadmissible. Smith *v.* Caro, 9 Ore. 278; Eaton *v.* McMahon, 42 Wis. 484. And while there has been some conflict in the decisions, the sounder doctrine puts all indorsements on substantially the same footing. The contract by a blank indorsement is fixed by law, and should not be rendered uncertain by parol, any more than when written out in full. Charles *v.* Denis, 42 Wis. 56, 58; Torbert *v.* Montague, 38 Colo. 325. This is the rule adopted in the statute, which makes the indorser's obligation absolute. Executors have no power to bind the estate of the testator by a contract of indorsement. Packard *v.* Dunfee, 119 App. Div. (N. Y.) 599.

§ 117. **Liability of indorser where paper negotiable by delivery.**—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser (*a*).

(*a*) Cover *v.* Meyers, 75 Md. 406. The holder of paper payable to bearer and indorsed may sue upon it as bearer or indorsee at his election. Daniel on Negotiable Instruments, section 663*a;* 3 Kent's Comm. 44. Formerly in some States a note payable to a designated payee or bearer could not be negotiated except by the indorsement of such person. See Garvin *v.* Wiswell, 83 Ill. 218; Blackman *v.* Lehman, 63 Ala. 547.

§ 118. **Order in which indorsers are liable.**—As respects one another, indorsers are liable *prima facie* in the order in which they indorse (*a*); but evidence is admissible to show that as between or among themselves they have agreed otherwise (*b*). Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally (*c*).

(*a*) This rule is general, and applies to accommodation indorsers as well as to others. Such indorsements import, not a joint but a several and successive, liability, each indorser being responsible to all who succeed him. Easterly *v.* Barber, 66 N. Y. 433; Kelly *v.* Burroughs, 102 N. Y. 93; Egbert *v.* Hanson, 34 Misc. 597; McCarty *v.* Roots, 21 How. (U. S.) 432; Bank of U. S. *v.* Beirne, 1 Gratt. 234; Hague *v.* Davis, 8 Gratt. 4; Shaw *v.* Knox, 98 Mass. 214; McDonald *v.* Magruder, 3 Peters, 470; Wood *v.* Repold, 3 Harris & J. 125; Clapp *v.* Rice, 13 Gray, 403; Howe *v.* Merrill, 15 Cush. 88; Talcott *v.* Cogswell, 3 Day, 512; Kirschner *v.* Conklin, 40 Conn. 77, 81; Wolf *v.* Hostetter, 182 Pa. St. 292; Russ *v.* Sadler, 197 Pa. St. 51.

(*b*) Morrison Lumber Co. *v.* Lookout Mt. Hotel Co., 92 Tenn. 6; Bank of Jamaica *v.* Jefferson, 92 Tenn. 537; Reinhart *v.* Schall, 69 Md. 352; Hale *v.* Danforth, 46 Wis. 554; Witherow *v.* Slaybach, 158 N. Y. 649; Patch *v.* Washburn, 82 Mass. 82; Breneman *v.* Furniss, 90 Pa. St. 186. Evidence to show an agreement for a joint liability; Easterly *v.* Barber, 66 N. Y. 433; Phillips *v.* Preston, 5 How. (U. S.) 278; Edelen *v.* White, 6 Bush.

408; *contra,* Johnson *v.* Ramsay, 43 N. J. Law, 279. Evidence to show contract that one was to be prior indorser: Slack *v.* Kirk, 67 Pa. St. 380; Reinhart *v.* Schall, 69 Md. 352; Slagel *v.* Rust, 4 Gratt. 274. The agreement may be evidenced by the circumstances of the case. Macdonald *v.* Whitfield, L. R. 8 App. Cas. 733; Hagerthy *v.* Phillips, 83 Me. 336; Clapp *v.* Rice, 13 Gray, 403. For a case where relief given in equity where order of indorsers changed on renewal of note without consent of one; see Slagel *v.* Rusts' Admr., 4 Gratt. 274. The statute has changed the law in New Jersey. Morgan *v.* Thompson, 72 N. J. Law, 244 246.

(*e*) This provision changes the law. Prior to the statute joint payees who indorsed were liable only jointly. Lane *v.* Stacy, 8 Allen, 41; Daniel on Negotiable Instruments, section 704.

§ 119. **Liability of agent or broker.**—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section one hundred and fifteen of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent (*a*).

(*a*) Meriden National Bank *v.* Gallaudet, 120 N. Y. 289; Cabot Bank *v.* Morton, 4 Gray, 156; Worthington *v.* Cowles, 12 Mass. 30.

ARTICLE VII.

Presentment for Payment.

Section 130. Effect of want of demand on principal debtor.
131. Presentment where instrument is not payable on demand.
132. What constitutes a sufficient presentment.
133. Place of presentment.
134. Instrument must be exhibited.
135. Presentment where instrument payable at bank.
136. Presentment where principal debtor is dead.
137. Presentment to persons liable as partners.
138. Presentment to joint debtors.
139. When presentment not required to charge the drawer.
140. When presentment not required to charge the indorser.
141. When delay in making presentment is excused.
142. When presentment may be dispensed with.
143. When instrument dishonored by non-payment.
144. Liability of person secondarily liable, when instrument dishonored.
145. Time of maturity.
146. Time; how computed.
147. Rule where instrument payable at bank.
148. What constitutes payment in due course.

§ 130. **Effect of want of demand on principal debtor.**—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument (*a*); but if the instrument is, by its terms, payable at a special place,

and he is able and willing to pay it there at maturity and has funds there available for that purpose (*b*), such ability and willingness are equivalent to a tender of payment upon his part (*c*). But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers (*d*).

(*a*) Statute applied in Farmers' Nat. Bank *v.* Venner, 192 Mass. 531, 534; Florence Oil Co. *v.* First Nat. Bank, 38 Colo. 119. For the rule of the common law see Wright *v.* Vermont Ins. Co., 164 Mass. 302; Payson *v.* Whitcomb, 15 Pick. 212; Howard *v.* Boorman, 17 Wis. 459; Rumbail *v.* Ball, 10 Md. 38; Frampton *v.* Coulson, 1 Wils. 33; Norton *v.* Ellam, 2 M. & W. 461; Hills *v.* Place, 48 N Y 520; Bush *v.* Gilmore, 45 App. Div. (N. Y.) 89 The action itself is a sufficient demand, and that though the instrument be payable on demand. The rule is general, and applies though the maker has made the note for accommodation and this is known to the holder. Hansborough *v.* Gray, 3 Gratt. 340

(*b*) The words "and has funds there available for that purpose" were added by Laws N. Y. 1898, ch. 336. They seem to be superfluous. It is difficult to see how a man can be *able* to pay unless he has the funds with which to make payment. Besides, if taken literally, they impose a condition not deemed necessary by the courts. If, for example, the "special place" where the paper is payable is the office of the maker or acceptor, this provision requires that he have the funds there, and it would not be enough that he have them in bank. The interpolation is not only at variance with the decisions on the subject, but is contrary to good sense, and to the practice of the business world. The change was made upon the suggestion of the Commissioners of Statutory Revision without the knowledge of the Commissioners on Uniformity of Laws. It affords a good illustration of the absurdities likely to result from legislative "tinkering."

(*c*) The rule adopted generally in the United States is that where a note is made payable at a particular bank or other place, or a bill of exchange is drawn or accepted payable in like manner, it is not necessary in order to recover of the maker or acceptor to aver or prove presentment or demand of payment at such place

on the day the instrument became due or afterward. The only consequence of a failure to make such presentment is that the maker or acceptor, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs. Hills *v.* Place, 48 N. Y. 520, 523; Parker *v.* Stroud, 98 N. Y. 379, 384; Cox *v.* National Bank, 100 U. S. 713; Wallace *v.* McConnell, 13 Peters, 136; Lazier *v.* Horan, 55 Iowa 77; Insurance Company *v.* Wilson, 29 W. Va. 543; Lockwood *v.* Crawford, 18 Conn. 361; Bond *v.* Storrs, 13 Conn. 416.

(*d*) Where, by the terms of the instrument, the holder has the option to declare the principal sum due upon default in the payment of interest he must prove presentment and notice in order to hold an indorser. Galbraith *v.* Shepard, 43 Wash. 698. Where a draft is drawn in another State, by one residing there, upon a person residing in New York, any legal question in reference to presentation and demand for payment is to be determined by the laws of New York. Sylvester *v.* Crohan, 138 N. Y. 494; Hibernia Bank *v.* Lacomb, 84 N. Y. 367. As to presentment of a bill drawn in New York upon a person doing business in a foreign country, see Amsinck *v.* Rogers, 189 N. Y. 252. The indorser is entitled to demand and notice notwithstanding he holds collateral security. Whitney *v.* Collins, 15 R. I. 44.

§ 131. **Presentment where instrument is not payable on demand.**— Where the instrument is not payable on demand, presentment must be made on the day it falls due (*a*). Where it is payable on demand, presentment must be made within a reasonable time after its issue (*b*), except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof (*c*).

(*a*) As to date of maturity, see section 145.

(*b*) Turner *v.* Iron Chief Mining Co., 74 Wis. 355; Mudds *v.* Harper, 1 Md. 110. This provision changed the law of New York, which prior to the statute was, that a promissory note payable on demand with interest was a continuing security, on which an indorser remained liable until an actual demand, and the holder was not chargeable with neglect for omitting to make such de-

mand within any particular time. Merritt *v.* Todd, 23 N. Y. 28; Pardee *v.* Fish, 60 N. Y. 265; Herrick *v.* Wolverton, 41 N. Y. 581; Wheeler *v.* Warner, 47 N. Y. 519; Crim *v.* Starkweather, 88 N. Y. 339; Parker *v.* Stroud, 98 N. Y. 379, 385; Shutts *v.* Fingar, 100 N. Y. 541. The object intended to be accomplished by the statute was to do away with the distinction between notes, or bills, payable on demand, which Merritt *v.* Todd had created, and to leave the question of their reasonable presentment for payment, in order to charge the parties to them, as one for the determination of the court upon the facts. Commercial Nat. Bank *v.* Zimmerman, 185 N. Y. 310. In Connecticut, prior to the Negotiable Instruments Law, promissory notes payable on demand were required to be presented within four months. Connecticut General Statutes, p. 405. But the later statute restores the rule of the common law as it formerly existed in that State. Hampton *v.* Miller, 78 Conn. 267, 271–272. A similar rule exists in California (Civil Code, section 3248), and in Minnesota (Minnesota statutes [1891], section 2104). In Vermont demand notes are overdue in sixty days. Paine *v.* Central Vermont R. R. Co., 118 U. S. 152. And this was formerly the rule in Massachusetts. (*Id.*) As to a note payable on demand, "with interest semi-annually," see Hayes *v.* Werner, 45 Conn. 252.

One of the most difficult questions presented for the decision of a court is, what shall be deemed a reasonable time within which to demand payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another. Seavor *v.* Lincoln, 21 Pick. 267. If the facts are disputed and the testimony conflicting, the question is a mixed one of law and fact, to be decided by the jury, under the instructions of the court, but where the facts are not in dispute the question is one of law. Commercial Nat. Bank *v.* Zimmerman, 185 N. Y. 310; German Am. Bank *v.* Mills, 99 App. Div. (N. Y.) 312; Guild *v.* Goldsmith, 9 Fla. 212.

As by section 26 an instrument negotiated when overdue is payable on demand, the requirement of section 131 is applicable in such cases. In theory paper indorsed when overdue is equivalent to a bill of exchange drawn on the party primarily liable, payable at sight. In this theory the necessity of demand

and notice is an essential element; not notice on a given day, as in the case of a maturing note, possible in that case, but impossible in the other, for the day appointed by the former maker and the new acceptor has passed; but notice after the holder has had reasonable time to make the demand on the maker, and has employed that time with diligence. Tyler *v* Young, 30 Pa. St. 143, 144; Leidy *v.* Tammany, 9 Watts, 353; Guild *v.* Goldsmith, 9 Fla. 212. In the case of a negotiable certificate of deposit there is much reason for saying that the parties do not contemplate an immediate demand of payment, and hence an indorsee may not be held to the same degree of diligence in presenting it for payment as the law requires in other cases. Lindsel *v.* McClellan, 18 Wis. 481. A note, presented in accordance with the request or assent of the indorser, is, as to him, presented in a reasonable time. Oley *v.* Miller, 74 Conn. 304, 308. A note payable "on demand after date" is a demand note, and not one payable on a fixed day, and hence, it need only be presented for payment within a reasonable time. Schlesinger *v.* Schultz, 110 App. Div. (N. Y.) 356. Where a note is payable "on demand and upon security given," the making of a demand accompanied by a tender of the securities is not a condition precedent to the maintenance of an action to recover upon the note, but it is sufficient for the plaintiff to produce and tender the note and the securities upon the trial. Spencer *v.* Drake, 84 App. Div. (N. Y.) 272. As to corporate bonds and coupons, see Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62.

The defense that the paper was not presented within a reasonable time after its issue need not be specially pleaded by an indorser; for, since the obligation of the indorser is conditional upon all the steps having been taken by the holder which the statute has prescribed as to presentment and as to notice of non-payment, the burden is on the holder to prove due and timely presentment. Commercial Nat. Bank *v.* Zimmerman, 185 N. Y. 210. The case last cited overrules German Am. Bank *v.* Mills, 99 App. Div. (N. Y.) 312, 315, where it was held that this section of the Negotiable Instruments Law creates a statute of limitations which must be pleaded. For other cases applying the statute, see Schlesinger *v.* Schultz, 110 App. Div. (N. Y.) 356; Citizens' Bank *v.* First Nat. Bank (Iowa), 113 N. W. Rep. 481.

(*c*) This provision applies to the indorser of a check. Columbian Banking Co. *v.* Bowen (Wis.) 114 N. W. Rep. 451. In the

case cited the Court said: "Keeping in mind that the discharge from liability above referred to because of unreasonable delay after the issuance of a check in presenting it for payment, is of the drawer only, and that this action is against the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to section 1678–1, which provides, as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, 'presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.' From the foregoing it seems plain that, as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereof. Formerly, the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed." See also Singer Manufacturing Co. *v.* Summers, 143 N. C. 103; Citizens Nat. Bank *v.* First Nat. Bank (Iowa), 113 N. W. Rep. 481; Plover Savings Bank *v.* Moodie (Iowa), 110 N. W. Rep. 29, 50. In the case last cited it was said: "The checks were negotiated by the appellee to the Des Moines Savings Bank, and under the statute already quoted (Code Supp. 1902, §§ 3060-a–71), reasonable time for presentation and demand is to be reckoned from the last negotiation of the paper. Checks are an almost universal substitute for money. They pass from hand to hand, bank to bank, and city to city, and within reasonable limits, it may be said that no matter how long they remain outstanding, so long as one negotiation promptly follows another and the checks are in fact in circulation the statute requires us to hold that the indorser is not legally preju-

diced by the consequent delay in their presentation for payment." Where the payee negotiates the check to his own agent the failure of the agent to present the check is the payee's own neglect. Gordon *v.* Levine, 194 Mass. 418. As respects discharge of the drawer by delay in making presentment, see section 322 and note.

§ 132. **What constitutes a sufficient presentment.**— Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf (*a*);

2. At a reasonable hour on a business day (*b*);

3. At a proper place as herein defined (*c*);

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made (*d*).

(*a*) The mere possession of a negotiable instrument which is payable to the order of the payee, and is indorsed by him in blank, or of a negotiable instrument payable to bearer, is in itself sufficient evidence of the right to present it and to demand payment thereof. Weber *v.* Orton, 91 Mo. 680; Sussex Bank *v.* Baldwin, 2 Harr. (N. J.) 487; Shedd *v.* Brett, 1 Pick. 401. And payment to such person will always be valid, unless he is known to the payer to have acquired possession wrongfully. Daniel on Negotiable Instruments, section 574. There is no need of a power of attorney or written instrument to constitute one an agent for this purpose. Shedd *v.* Brett, 1 Pick. 401. But the mere possession of an instrument payable to order and not indorsed by the payee is not alone sufficient evidence of the authority of an assumed agent to receive payment. Doubleday *v.* Kress, 50 N. Y. 410. Where a bank holding a note for collection sends it for the same purpose to the bank where it is payable, the latter is authorized to demand payment and give notice of dishonor. Blakeslee *v.* Hewett, 16 Wis. 341.

(*b*) Except in cases where the instrument is payable at a bank, the holder has the whole day in which to present the same, the only limitation being that he must present it at a reasonable

hour, and this may depend upon the circumstances of the case. Salt Springs National Bank *v.* Burton, 58 N. Y. 430; Farnsworth *v.* Allen, 4 Gray, 453; Barclay *v.* Bailey, 2 Camp. 527; Wilkins *v.* Jadis, 2 B. & Ad. 188. As late as nine o'clock in the evening has been held to be a reasonable hour. Farnsworth *v.* Allen, 4 Gray, 453. But it is only when presentment is at the residence that the time is extended into the hours of rest. If it is at the place of business it must be during those business hours when such places are customarily open, or, at least, while some one is there competent to give an answer. Waring *v.* Betts, 90 Va. 46, 53. As to when instruments payable at bank must be presented, see section 135.

(*c*) See next section.

(*d*) Cromwell *v.* Hynson, 2 Camp. 596; Phillips *v.* Astberg, 2 Taunt. 206.

§ 133. **Place of presentment.**—Presentment for payment is made at the proper place.

1. Where a place of payment is specified in the instrument and it is there presented;

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment (*a*).

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence (*b*).

(*a*) Gates *v.* Beecher, 60 N. Y. 518, 522; Holtz *v.* Boppe, 37 N. Y. 634. A presentment at the maker's usual place of business during business hours, there being no one there to answer, is a sufficient demand to charge the indorser; for the maker is bound to have a suitable person there to answer inquiries, and pay his notes, if there demanded. Baumgardner *v.* Reeves, 35 Pa. St. 250; Wallace *v.* Crilly, 46 Wis. 577. And presentment at such place is sufficient, though it be closed, there being no explanation fur-

nished as to why it is closed. Sulsbacker *v.* Bank of Charleston, 86 Tenn. 201. If, however, the party has abandoned his place of business at the maturity of the paper, but has a residence or other place of business in the city, which could be ascertained by reasonable inquiry, a presentment at the former place of business would not be sufficient. (*Id.*) The making and dating of a promissory note at a particular place is not equivalent to making it payable there, nor does it supersede the necessity for presentment and demand at the residence or place of business of the maker if it be known, or if by due diligence in making inquiry it could be ascertained. Oxnard *v.* Varnum, 111 Pa. St. 193. But where a bill of exchange is addressed to the drawee at a particular house, and the same is accepted generally by him, the address indicates the place where it is to be presented for payment, and a presentment there is sufficient as against the drawee and indorsers. Pierce *v.* Struthers, 27 Pa. St. 249, 254; Struthers *v.* Blake *et al.*, 30 Pa. St. 139. Where a note is dated at a particular place, and no other place is designated as that of its negotiation and payment, the presumption is that the maker resides where the note is dated, and that he contemplates payment at that place. Sasscer *v.* Stone, 10 Md. 98; Ricketts *v.* Pendleton, 14 Md. 320; Nailor *v.* Bowie, 3 Md. 251; Clark *v.* Seabright, 135 Pa. St. 173. But this is presumption only, and if he resides elsewhere within the State when the note falls due, and this is known to the holder, demand must be made at the maker's residence or place of business. Sasscer *v.* Stone, 10 Md. 98. When the maker does not reside, and has no place of business, in the State where the note is payable, no demand upon him is necessary in order to charge the indorser. Ricketts *v.* Pendleton, 14 Md. 320. And if the maker absconds, this will generally excuse the demand; but if he changes his residence within the same jurisdiction, the holder must endeavor to find it and make demand there. Nailor *v.* Bowie, 3 Md. 251. But where the maker or acceptor waives presentment at his place of business or residence, presentment elsewhere may be sufficient. King *v.* Holmes, 11 Pa. St. 456; Parker *v.* Kellogg, 158 Mass. 90.

(*b*) If the maker leaves the State subsequent to the making of the note, presentment at his former place of business or residence is sufficient. Nailor *v.* Bowie, 3 Md. 251.

§ 134. **Instrument must be exhibited.**—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it (*a*).

(*a*) Ocean Nat. Bank *v.* Fant, 50 N. Y. 474, 476; Smith *v.* Rockwell, 2 Hill, 482; Musson *v.* Lake, 4 How. 262; Freeman *v.* Boynton, 7 Mass. 483; Draper *v.* Clemens, 7 Mo. 52. This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession upon paying the amount. Waring *v.* Betts, 90 Va. 46, 51. Demand of payment without actual exhibition of the note is sufficient to bind the indorser where the maker does not demand to see the note but refuses payment on other grounds. Legg *v.* Viman, 165 Mass. 555; Waring *v.* Betts, 90 Va. 46; Lockwood *v.* Crawford, 18 Conn. 361; Fall River Union Bank *v.* Willard, 5 Metcalf, 216. Where the note is secured by collaterals the maker is entitled to require that they be delivered with the note; and if he insists upon it, they must be tendered with the note or the demand of payment will not be sufficient. Ocean Nat. Bank *v.* Fant, 50 N. Y. 474.

§ 135. **Presentment where instrument payable at bank.**—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient (*a*).

(*a*) See Salt Springs National Bank *v.* Burton, 58 N. Y. 430; Bank of Syracuse *v.* Hollister, 17 N. Y. 46; Bank of Utica *v.* Smith, 18 Johns. 230; Parker *v.* Gordon, 7 East. 387; Garnett *v.* Woodcock, 1 Starkie, 475; Reed *v.* Wilson, 41 N. J. Law, 29; Waring *v.* Betts, 90 Va. 46; Shepard *v.* Chamberlain, 8 Gray, 225. What will constitute banking hours within the meaning of the statute has reference to the general custom of the place where the transaction occurs. Columbian Banking Co. *v.* Bowen (Wis.), 114 N. W. Rep. 451. Thus, where presentment was made to a Chicago bank between three and six o'clock in the afternoon, and

it appeared that the business day of the bank continued after the close of clearing-house transactions, so as to enable banks holding paper for collection to present those items which had been refused payment through the clearings, it was held that the presentment satisfied the requirements of the statute. (*Id.*)

If a note held by a bank at which it is payable is not paid when due, no presentment and demand of payment are necessary. Dykman *v.* Northridge, 1 App. Div. (N. Y.) 26. It is sufficient that the note was in the bank on the day it fell due, and that there were no funds of the maker there, or other provision for payment. Hallowell *v.* Curry, 41 Pa. St. 322. It has been held that the office of a private banker is not a bank within the terms of a note made payable at "any bank in Boston." Way *v.* Butterworth, 108 Mass. 509. As to bank customs see Grand Bank *v.* Blanchard, 23 Pick. 305, 306; Mechanics' Bank *v.* Merchants' Bank, 6 Metc. 13, 24; Boston Bank *v.* Hodges, 9 Pick. 420; People's Bank *v.* Keech, 26 Md. 521. But now that the statute prescribes the rules as to presentment these matters can no longer be governed by custom; certainly not if the custom conflicts with the statute. Under the statute, paper payable at a bank may be presented there though the bank is closed and in the hands of a receiver, and a demand upon the receiver personally is not necessary. Schlesinger *v.* Schultz, 110 App. Div. (N. Y.) 356. See also Berg *v.* Abbott, 83 Pa. St. 177. But compare Hutchison *v.* Crutcher, 98 Tenn. 421, where it was held that when a national bank has been placed in the hands of a receiver, paper payable at the bank should be presented at the office of the receiver. See section 133, subdivision 1.

The authorities are not agreed upon the point as to the precise time when suit may be brought on a dishonored note payable at a bank, some holding that it cannot be brought until the day after its dishonor, others that it may be brought at any time after the expiration of business hours on the day it is payable, and others still that it may be commenced as soon as payment is refused on that day. Citizens' Bank *v.* Lay, 80 Va. 436, 440; Church *v.* Clark, 21 Pick. 309; Blackman *v.* Nearing, 43 Conn. 60; Humphreys *v.* Sutcliffe, 192 Pa. St. 336.

§ 136. **Presentment where principal debtor is dead.**—Where the person primarily liable on the instrument is dead,

(*a*) and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found (*b*).

(*a*) But there must be competent and legal proof of his death, and that the party upon whom the demand was made was such representative; the statement of these facts in the protest is not *prima facie* proof thereof. Weems *v.* Farmers' Bank, 15 Md. 231.

(*b*) The fact that the holder is excused from making presentment under this section does not relieve him from the duty of giving notice of dishonor to the indorser. Reed *v.* Spear, 107 App. Div. (N. Y.) 144. See this case, also, for what evidence will justify a finding that the holder could not, with reasonable diligence, make presentment to the administrator of the deceased maker.

§ 137. **Presentment to persons liable as partners.**—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm (*a*).

(*a*) Gates *v.* Beecher, 60 N. Y. 518; Cayuga County Bank *v.* Hunt, 2 Hill, 635; Crowley *v.* Barry, 4 Gill, 194; Fourth Nat. Bank *v.* Henschuk, 52 Mo. 207.

§ 138. **Presentment to joint debtors.**— Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all (*a*).

(*a*) Gates *v.* Beecher, 60 N. Y. 518, 523; Union Bank *v.* Willis, 8 Metc. 504; Arnold *v.* Dresser, 8 Allen, 435; Willis *v.* Green, 5 Hill, 232; Benedict *v.* Schmieg, 13 Wash. 476. In some cases this might be impracticable, but such cases are covered by section 142. The holder of a joint and several note may sue one maker alone upon one cause of action arising out of the note and all makers generally upon another such cause of action. Davis *v.* Schmidt, 126 Wis. 461.

§ 139. **When presentment not required to charge the drawer.**— Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument (*a*).

(*a*) But presentment is not dispensed with merely because the drawer has no funds in the hands of the drawee. Life Insurance Company *v.* Pendleton, 112 U. S. 708; Dickens *v.* Beal, 10 Pet. 572; Welch *v.* B. C. Taylor Mfg. Co., 82 Ill. 581; Kimball *v.* Bryan, 56 Iowa, 632; Kingsley *v.* Robinson, 21 Pick. 327. It is sufficient if the drawer had a reasonable expectation that the bill would be paid; or if there was an agreement between him and the drawee that the latter should accept, or a course of dealing between them by which the drawee was accustomed to accept without reference to the state of the mutual account. See cases cited above. Presentment of a check is excused where the making of the check was a fraud upon the part of the drawer, he having no funds in the bank, and no ground for a reasonable expectation that it would be paid. Beaureguard *v.* Knowlton, 156 Mass. 395, 396.

§ 140. **When presentment not required to charge the indorser.**— Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

§ 141. **When delay in making presentment is excused.**— Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence (*a*). When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

(*a*) Windham Bank *v.* Norton, 22 Conn. 213; Pier *v.* Heinrichsoffen, 67 Mo. 163. In these cases the delay was caused by

miscarriage in the mail. See section 176. Sickness of the holder of the note is not an excuse for the failure to present it at the proper time, unless it was not only sudden, but so severe as not only to prevent him from making the presentment and giving notice of non-payment himself, but from employing another person to do it; and then it must be shown that the proper steps were taken as soon as the disability was removed. Wilson *v.* Senier, 14 Wis. 380. Where the facts are not disputed the question of due diligence is one of law for the court; but if there is a dispute as to the facts, the question is for the jury. Belden *v.* Lamb, 17 Conn. 451.

§ 142. **When presentment may be dispensed with.**— Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made (*a*);
2. Where the drawee is a fictitious person;
3. By waiver of presentment express or implied (*b*).

(*a*) The burden is upon the holder to show that due diligence was used. Eaton *v.* McMahon, 42 Wis. 484. It is the duty of a holder to give the notary information as to the residence of the drawer and indorser; and if this is unknown to the holder, he must inquire of those whose names are upon the note or bill as to the residence which he does not know. If there are none such, he must use due diligence to ascertain them. It will not do for the holder to put the note or bill in the hands of the notary at the place where it was drawn without furnishing him any information as to the residence of the maker, or that of the indorser, and then for the notary, without inquiry from him, to return the note without demand or notice. The holder is the one most likely of all persons to know the place of residence of those to whom he looks for payment, and due diligence requires that he should give the information to his agent, whom he employs to make demand from the maker and give notice to the indorser; or, if he neglects to do so, that the agent should require of him where the parties reside. Smith *v.* Fisher, 24 Pa. St. 222. When the facts are undisputed, the question of diligence is for the court. Smith *v.* Fisher, 24 Pa. St. 222; Wheeler *v.* Field, 6 Mete. 290. Presentment is not dispensed with by the insolvency of the maker or

drawee. Reincke *v.* Wright, 93 Wis. 368; Hawley *v.* Jette, 10 Oregon 31; Bensonhurst *v.* Willby, 45 Ohio St. 340; Jackson *v.* Richards, 2 Caines, 343; Armstrong *v.* Thurston, 11 Md. 148.

(*b*) The waiver may be made either during the currency of the note or after its maturity. Power *v.* Mitchell, 7 Wis. 161. And evidence of contemporaneous facts and circumstances, at the time of the transaction, may be shown in evidence, in order to ascertain whether or not a waiver was intended. Baumeister *v.* Kuntz (Fla.), 42 So. 886. The waiver may be made either verbally or in writing. Smith *v.* Lownsdale, 6 Oregon 78. Nor is it necessary that the waiver should be direct and positive. It may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. Cady *v.* Bradshaw, 116 N. Y. 188, 191. The assent must be clearly established, however, and will not be inferred from doubtful or equivocal acts or language. Ross *v.* Hurd, 71 N. Y. 14. But any language is sufficient, which is calculated to induce the holder to forbear taking the necessary steps to charge the indorser. Torbert *v.* Montague, 38 Colo. 325; Moyer & Brothers' Appeal, 87 Pa. 129; Boyd *v.* Bank of Toledo, 32 Ohio St., 526. Where the indorser requests the holder to extend the time of payment and promises to let his name remain on the instrument, this will amount to a waiver of presentment and notice of non-payment. Cady *v.* Bradshaw, 116 N. Y. 188, 191, 192. So, a telegram sent to the collecting bank requesting it to pay the note and save protest and draw, in reply to an inquiry made of the firm by such bank, is a sufficient waiver. Seldner *v.* Mount Jackson National Bank, 66 Md. 488. So, where an indorser admits his liability at the time of the maturity of the note and accompanies such admission with an offer to "arrange the matter" with the holders, and thereafter by his conduct shows that he regards himself as liable, and asks for indulgence. Moyer & Brothers' Appeal, 87 Pa. St. 129. So, where a note is a short time before the day of its maturity, presented to an indorser, and the latter then promises that if the note is suffered to run he will pay it whenever payment is called for. Hale *v.* Danforth, 46 Wis. 554. And so, where, in response to inquiry by the holder, the indorser told him that it would be of no use to call upon the maker. Barker *v.* Parker, 6 Pick. 80. A waiver of notice merely

does not excuse demand of payment. Berkshire Bank *v.* Jones, 6 Mass. 524; Low *v.* Howard, 11 Cush. 268, 270.

An agreement to waive demand and notice is not within the statute of frauds; it is not a new contract, but only a waiver absolutely or in part of a condition precedent to liability. Taunton Bank *v.* Richardson, 5 Pick. 436; Barclay *v.* Weaver, 19 Pa. St. 396; Power *v.* Mitchell, 7 Wis. 159, 166. And from the nature of the indorser's contract no new consideration is required to support the waiver whether given before or after the maturity of the paper. Burgettstown Nat. Bank *v.* Nill, 213 Pa. St. 456. The facts constituting the waiver must be specifically pleaded. Galbraith *v.* Shepard, 43 Wash. 698. As to waiver where the maker has transferred all his property to the indorsee, see Brandt *v.* Mickle, 26 Md. 436; Mechanics' Bank *v.* Griswold, 7 Wend. 165; Moore *v.* Alexander, 63 App. Div. (N. Y.) 100; Brown *v.* Maffey, 15 East 222; Bond *v.* Farnham, 5 Mass. 170. For cases construing waivers see Parr *v.* City Trust Company, 95 Md. 291, 300–301; Toole *v.* Crafts, 193 Mass. 110; Baumeister *v.* Kuntz (Fla.), 42 So. Rep. 886.

§ 143. **When instrument dishonored by non-payment.**— The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

§ 144. **Liability of person secondarily liable, when instrument dishonored.**— Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder (*a*).

(*a*) When the indorser's liability has been fixed by demand and notice of dishonor, he becomes an independent and principal debtor, and does not stand in the position of a mere surety. German-American Bank *v.* Niagara Cycle Co., 13 App. Div. (N. Y.) 450; First Nat. Bank *v.* Wood, 71 N. Y. 405, 411. Though the holder has received collateral from the maker, the law implies no

contract to proceed on the collaterals before suing the indorser. Buck *v.* Freehold Bank, 37 N. J. Law, 307. The section does not change the law as to conditional guaranties, as, for example, a guaranty of the collectibility of the instrument, in which case there is no right of recourse against the guarantor until the holder has first made proper effort to collect from the principal debtor, Cowles *v.* Peck, 55 Conn. 251; Summers *v.* Barrett, 65 Iowa, 292; for in such case the terms of the express contract exclude the idea of an intention to incur the liability prescribed by the statute.

§ 145. **Time of maturity.**—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable (*a*) on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday (*b*).

(*a*) The words "or becoming payable" were added by Laws of New York, 1898, chapter 336. This amendment seems to have been made upon the suggestion of some one who feared that the phrase "falling due on Saturday," might not include a case where the date of maturity occurs on a holiday immediately preceding Saturday. The doubt seems to have been based upon a misconception of the correct meaning of the term "falling due." In common parlance, we sometimes speak of paper as "falling due on a holiday," meaning by this, that the time for which the note or bill has to run matures on that day; but this language is not strictly accurate; for, as the holiday is *dies non,* the paper is not, in fact, *due* on that day, but is due on the day following. In the case mentioned, therefore, paper so maturing may be correctly described as "falling due on Saturday." As to paper maturing on Saturday, however, where that day is not a holiday, there is a distinction between "falling due" and "becoming payable;" for, in such case, Saturday is not *dies non,* and, properly speaking, the paper is due on that day, though for the convenience of

bankers and others, the statute authorizes presentment on Monday. This distinction was observed in the section as it stood originally, but the amendment destroys the harmony between the second and third sentences. The only other States which have adopted this change appear to be Missouri and Virginia.

(*b*) Laws of Mass. March 30, 1895, May 28, 1895; Laws of Maine, 1897, Ch. 259; Laws of New York, 1887, Ch. 289, Ch. 461; Laws of Penn. May 31, 1893; Laws of U. S. Feb. 18, 1893; Laws of N. J. 1895, Ch. 43. This section varies greatly in the different States, both as to grace and as to paper maturing on Saturday.

§ 146. **Time; how computed.**— Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment (*a*).

(*a*) See New York Statutory Construction Law, sections 26, 27.

§ 147. **Rule where instrument payable at bank.**— Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon (*a*).

(*a*) Prior to the statute there was some conflict in the decisions as to the authority of a bank to pay a note or acceptance made payable there. The rule adopted in the statute is sustained by the weight of authority; and is also the rule which is most convenient in practice. It is supported by the following decisions: Aetna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82; Commercial Bank *v.* Hughes, 17 Wend. 94; Commercial Nat. Bank *v.* Henninger, 105 Pa. St. 496; Bedford Bank *v.* Acoarn, 125 Ind. 582; Home Nat. Bank *v.* Newton, 8 Bradwell, 563; *contra:* Grissom *v.* Commercial Bank, 87 Tenn. 350. In Pennsylvania it is held that where a bank is the holder of a note payable at the banking house, and upon its maturity the maker has a cash deposit in such bank exceeding the amount of the note, which deposit is not specially applicable to a particular purpose, the bank is bound to charge up the amount of the note against the deposit. In such

cases the note is in effect a draft on the bank in favor of the holder, and in discharge of the indorser. German National Bank *v.* Foreman, 138 Pa. St. 474, 479; Commercial National Bank *v.* Henninger, 105 Pa. 496. But it is also held in that State that while a bank which has discounted a promissory note may appropriate to the payment of the note funds in its hands belonging to any party to the note, when payment is not made at the time and place named, yet it is not bound to do so as to any party except the makers. Mechanics' and Traders' Bank *v.* Seitz, 150 Pa. St. 632.

§ 148. **What constitutes payment in due course.**—Payment is made in due course when it is made at or after the maturity of the instrument (*a*) to the holder (*b*) thereof in good faith and without notice that his title is defective.

(*a*) Payment before the day is a defense which binds only the party receiving payment and those who stand in his shoes. Watson *v.* Wyman, 161 Mass. 96, 99.

(*b*) It is the duty of the maker or acceptor to require a production of the paper before paying the same, and possession is generally the only adequate evidence upon which he has any right to rely. Loizeaux *v.* Fremder, 123 Wis. 193; Adair *v.* Lenox, 15 Oregon 489. The rule is that if a bill or note be paid at maturity, in full, by the acceptor or maker, or other party liable to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But if upon such payment the holder has not the actual possession of the paper ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment, and it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person has such right, the payment will not discharge the party paying, but will be a payment in his own wrong. Wheeler *v.* Guild, 20 Pick. 545, 553; Trustees of the I. I. Funds *v.* Lewis, 34 Fla. 424, 428. Concerning this rule, the Supreme Court of Wisconsin said in a late case: "It is so simple, and, once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves

against unauthorized acts of others, that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment without actual presentation. It is justified in application to negotiable paper distinctively from other property by the very dominant purpose of easy and probable transfer at any moment, so that what may be true as to ownership of such paper on one day is likely to have changed on the next. On the probability of such change the negotiability of the instrument is a continual warning." Loizeaux *v.* Fremder, 123 Wis. 193, 198. Such rule applies generally to all negotiable paper independently of the existence of any mortgage or other security. Marling *v.* Nommensen, 127 Wis. 363. Payment made to the original holder, after indorsement and delivery of the paper even as collateral security, is no defense to a suit on the note by the indorsee, although the payment was made by the maker without notice or knowledge of the transfer. Gosling *v.* Griffin, 85 Tenn. 737. But while a person not in the actual possession of negotiable paper is presumed from that fact alone to have no authority to receive payment thereon, yet such presumption may be rebutted and overcome by evidence showing actual authority. Swengle *v.* Wells, 7 Ore. 222. The original payee of a negotiable note in possession thereof, is presumed to be the owner, and has ostensible authority to receive payment, although the note bears the blank indorsement of such payee. Home Savings Bank *v.* Stewart (Neb.), 110 N. W. Rep. 947.

ARTICLE VIII.

Notice of Dishonor.

Section 160. To whom notice of dishonor must be given.
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§ 160. **To whom notice of dishonor must be given.**—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged (*a*).

(*a*) The burden of proving that due notice was given is on the holder. Marks *v.* Boone, 24 Fla. 177. Where a note gives the holder an option to declare the whole sum due upon default in the payment of interest, he must allege and prove presentment and notice of dishonor in order that he may hold an indorser. Galbraith *v.* Shepard, 43 Wash. 698. The cashier of a bank, when informed of an outstanding check, after it had been placed in the mails for transmission to the drawee for payment, stated to the cashier of the bank remitting the check that it would be paid if the drawer had sufficient funds when the check was received, otherwise not:—*Held,* that such information did not constitute a dishonor of the check, so as to require the holder to give notice to the indorser before payment had, in fact, been refused on the receipt of the check by the drawee. Citizens Bank *v.* First Nat. Bank (Iowa), 113 N. W. Rep. 481. The rule as to notice does not apply to guarantors. Brown *v.* Curtiss, 2 N. Y. 225; Allen *v.* Rightmere, 20 Johns. 365; Breed *v.* Hillhouse, 7 Conn. 523; Roberts *v.* Hawkins, 70 Mich. 566; Hungerford *v.* O'Brien, 37 Minn. 306. And proceedings against the maker are necessary only where there is a guaranty of collection. Brown *v.* Curtiss, *supra.*

§ 161. **By whom given.**—The notice may be given by or on behalf of the holder, or by or on behalf of any party

to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given (*a*).

(*a*) It was once held that no party could give a valid notice unless he was the holder at the time. Tindal *v.* Brown, 1 Term Rep. 167. But this doctrine, after having been followed in other cases (*ex parte* Barclay, 7 Ves. 597; Stewart *v.* Kennett, 2 Camp. 177), was expressly overruled in the case of Chapman *v.* Keane (3 Adol. & Ellis, 193), in which most of the previous decisions were reviewed. But notice by a stranger is not sufficient. Lawrence *v.* Miller, 16 N. Y. 235, 237; Chanoine *v.* Fowler, 3 Wend. 173; Brailsford *v.* Williams, 15 Md. 151. And a party who has been discharged by laches, and cannot in any event bring an action on the instrument, is deemed a stranger for this purpose. Harrison *v.* Ruscoe, 15 L. J. Exch. 110; 15 M. & W. 231. A drawee who refuses acceptance cannot give notice. Stanton *v.* Blossom, 14 Mass. 116. A firm executed two promissory notes payable to the order of a member of the firm, which notes were first indorsed by J. and then by the firm, and were delivered before maturity to the plaintiff bank. The notes not being paid at maturity, notice of protest was served upon the firm and with it, under separate cover, addressed to J in care of the firm, was a notice of protest directed to J, which the firm were requested to forward to him. The other member of the firm immediately mailed such notice of protest to J, at the latter's regular address for receiving mail in the city of New York:—*Held*, that while J was presumptively an accommodation indorser for the firm which made the notes, and while the firm could not, therefore, in their own behalf, give him a valid notice of protest, the firm could and did, on behalf of the plaintiff bank, and as its agents, give such a notice. Traders' Nat. Bank *v.* Jones, 104 App. Div. (N. Y.) 433.

§ 162. **Notice given by agent.**— Notice of dishonor may be given by an agent either in his own name (*a*) or in the name of any party entitled to give notice, whether that party be his principal or not (*b*).

(*a*) Drexler *v.* McGlynn, 99 Cal. 143. But a notice made out by a notary public and signed by mistake with the name of the maker of the note instead of with his own name, without the authority of the maker, is insufficient. Cabot Bank *v.* Warner, 92 Mass. 522.

(*b*) Banks as agents for collection have authority to receive and transmit notices on behalf of the owners of the paper. West River Bank *v.* Taylor, 34 N. Y. 128, 130; Colt *v.* Noble, 5 Mass. 167; Haynes *v.* Birks, 3 Bor. & Pul. 599; Robson *v.* Bennett, 2 Taunt. 388. An agent in giving notice represents and acts on behalf of his principal, and this, though he may be a notary and act in his official character. Lawrence *v.* Miller, 16 N. Y. 235, 238.

§ 163. **Effect of notice given on behalf of holder.**—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given (*a*).

(*a*) But the holder is not bound to give notice to any one but his immediate indorser. West River Bank *v.* Taylor, 34 N. Y. 128, 131; Linn *v.* Horton, 17 Wis. 150, 153.

§ 164. **Effect where notice is given by party entitled thereto.**— Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 165. **When agent may give notice.**— Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder (*a*).

(*a*) Rosson *v.* Carroll, 90 Tenn. 90. But if the agent has failed to give notice to his principal in due time, the latter is cut off, though he may thereafter use due diligence in communicating notice to antecedent parties. (*Id.*)

§ 166. **When notice sufficient.**—A written notice need not be signed (*a*), and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby (*b*).

(*a*) See Bank *v.* Dibrell, 91 Tenn. 301; Spann *v.* Baltzell, 1 Fla. 301; Kilgore *v.* Bulkley, 14 Conn. 362; Tobey *v.* Lenning, 14 Pa. St. 483.

(*b*) Aiken *v.* Marine Bank, 16 Wis. 679. Where the instrument is misdescribed, the fact that there is no other instrument to which the notice could be applied may be shown by extrinsic evidence. Cayuga County Bank *v.* Worden, 6 N. Y. 19. But a notice of protest signed by a notary public, and personally delivered by him to the indorser is not sufficient to charge the latter, where it appears that the notice was addressed to another person than the indorser, and stated that the holder looked to such person for the payment of the note. Marshall *v.* Sommeman, 216 Pa. St. 65.

§ 167. **Form of notice.**— The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment (*a*). It may in all cases be given by delivering it personally (*b*) or through the mails (*c*).

(*a*) Second National Bank *v.* Smith, 118 Wis. 18; Sasseer *v.* Farmers' Bank, 4 Md. 409; Brewster *v.* Arnold, 1 Wis. 264. A notice which omits an essential feature of the note, or misdescribes it, is an imperfect one, but not necessarily invalid. It is invalid only where it fails to give that particular information which it would have given but for its particular imperfection; and even

in case the notice in itself be defective, if, from evidence *aliunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored instrument, he will be charged. Hodges *v.* Schuler, 22 N. Y. 114; Artisans' Bank *v.* Backus, 36 N. Y. 106; Gill *v.* Palmer, 29 Conn. 57; Howland *v.* Adrian, 29 N. J. Law, 48; Derham *v.* Donohue, 155 Fed. Rep. 385. To make the notice defective the variance must be such as that, under the circumstances of the case, it conveys no sufficient knowledge to the indorser of the identity of the particular instrument which has been dishonored. Cayuga County Bank *v.* Worden, 1 N. Y. 413, 417; Mills *v.* Bank of U. S., 11 Wheat. 431; Bank of Alexandria *v.* Swaim, 9 Peters, 33. The notice is not necessarily defective because it is silent as to the date and time of payment, Youngs *v.* Lee, 12 N. Y. 551, or fails to state that demand of payment was made, Mills *v.* Bank of U. S., 11 Wheat. 431, or does not state at whose request it is given, nor who is the owner of the note. Shed *v.* Brett, 1 Pick. 401. The term "protested" when contained in a notice, with the statement that the holder looks to the indorser for indemnity, fairly and necessarily implies that the note or bill has been dishonored. Brewster *v.* Arnold, 1 Wis. 264. A note is well described when its maker, payee, date, amount and time of payment are stated. A printed notice is sufficient, Cuyler *v.* Stevens, 4 Wend. 566; Bank of Cooperstown *v.* Woods, 28 N. Y. 545, and the signature of the notary need not be in writing, but may be printed. Bank of Cooperstown *v.* Woods, 28 N. Y. 561; Sussex Bank *v.* Baldwin, 2 Harr. (N. J.), 487. But a notice which is barely enough to put the indorser upon inquiry is not sufficient. Cook *v.* Litchfield, 9 N. Y. 279, 281. It must reasonably apprise the party of the particular paper upon which he is sought to be charged. Home Insurance Co. *v.* Greene, 19 N. Y. 518; Dodson *v.* Taylor, 56 N. J. Law, 11. In the New York case cited the name of the maker was left blank, and it was held that the notice was not sufficient. Notice that a note is unpaid would not necessarily imply that it is dishonored, because the note might remain unpaid, while in fact it may never have been presented to the maker for payment. Hunter *v.* Van Bomhorst, 1 Md. 504, 510. But such notice might be good if the note is payable at a bank. *Id.* If the notice indicates that the paper was presented before due, it is not sufficient. Etting *v.* Schuylkill Bank, 2 Pa. St. 355. The statement that the holder looks for payment to the party to whom notice is sent is

not necessary; for this is implied from the fact of giving notice. Bank of U. S. *v.* Carneal, 2 Peters, 543; Mills *v.* Bank of U. S., 11 Wheat. 431, 436; Nelson *v.* First Nat. Bank, 29 U. S. App. 554; 69 Fed. Rep. 798, 801; 16 C. C. A. 425; Cowles *v.* Horton, 3 Conn. 523. A certificate of deposit dated January 25, 1904, due January 25, 1905, was duly presented for payment. Payment was demanded and refused on January 25, 1905. Thereupon a notice of presentment, demand, and dishonor was sent to, and received by, the indorser, which was dated January 25, 1904, when it should have been dated January 25, 1905, which stated that the demand and dishonor were on the day of the date of the notice, that the certificate was dated January 25, 1905, when it was dated January 25, 1904, and it omitted to recite this clause which was in the certificate, "No interest after six months."—*Held,* that the notice sufficiently identified the certificate and notified the indorser of due presentment, demand, and dishonor. Derham *v.* Donohue, 155 Fed. Rep. 385. Where there is no dispute as to the facts, the question of the sufficiency of the notice is a question of law for the court. Cayuga County Bank *v.* Worden, 6 N. Y. 19.

(*b*) The statute was not intended to change the rule as it previously existed. Where personal service is relied upon, the evidence must show either actual personal service or an ordinarily intelligent, diligent effort to make personal service upon the indorser either at his place of business during business hours, or at his residence if he have no place of business; but if he be absent, it is not necessary to call a second time, and the notice may, in that event, be left with any one found in charge, or if there be no one in charge, or no one there, then the giving of notice is deemed to be waived. American Exchange National Bank *v.* American Hotel Victoria Co., 103 App. Div. (N. Y.) 372, 374.

(*c*) The rule of the commercial law was well settled that if the parties resided in the same place the notice must be personal; that is, must be given to the individual or left at his domicile or place of business. Sheldon *v.* Benham, 4 Hill, 129; Brown *v.* Bank of Abingdon, 85 Va. 95; Boyd's Admr. *v.* City Savings Bank, 15 Gratt. 501, 505; Bell *v.* Hagerstown Bank, 7 Gill, 216; Westfall *v.* Farwell, 13 Wis. 504, 509. But the courts have been inclined to restrict the general rule, and established many exceptions to it. Bank of Columbia *v.* Lawrence, 1 Peters, 578. In the notes to 1 American Lead. Cas. (402) it is said: "It is obvious that the rule

requiring personal notice, where the parties reside in the same place, has lost its reasonable force and exists only by authority. Instead of undermining it by exceptions that conflict with it in principle and render the subject embarrassing in practice, it would be much better to declare that the rule itself has become obsolete and is abolished." But it cannot properly be said that the rule had become obsolete, having been recognized and acted on in many recent as well as older cases, and having in no case been denied or disregarded. It was, therefore, too firmly established to be abolished by the courts. See Boyd's Admr. *v.* City Savings Bank, 15 Gratt. 501, 505. In New York, service by mail in such cases was authorized by Laws 1857, Chap. 416. For the construction of the former statute of Wisconsin see Smith *v.* Hill, 6 Wis. 154; Westfall *v.* Farwell, 13 Wis. 504.

§ 168. **To whom notice may be given.**—Notice of dishonor may be given either to the party himself or to his agent in that behalf (*a*).

(*a*) Fassin *v.* Hubbard, 55 N. Y. 465, 471; Lake Shore National Bank *v.* Butler Colliery Co., 51 Hun, 63, 68. In Firth *v.* Thrush, 8 Barn. & Cress. 387, the opinion was expressed that authority to indorse negotiable paper carried with it authority to receive notice of its dishonor. And in Persons *v.* Kruger, 45 App. Div. 187, it was held that a notice of protest may be served upon an agent of the payee and indorser, where the agent has authority to make and indorse paper, and has authority to act and has acted as the general agent of the payee in the conduct of his business, and has had full charge of the acts and dealings with the bank at which the paper was discounted and the management of the paper. A notice of non-payment sent to the indorser inclosed under seal and delivered by the messenger to one in the employment of the indorser, with directions not to open it, is insufficient. Paine *v.* Edsell, 19 Pa. St. 178.

§ 169. **Notice where party is dead.**—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found (*a*). If there be no personal representative, notice may be sent to

the last residence or last place of business of the deceased (*b*).

(*a*) Denninger *v.* Miller, 7 App. Div. (N. Y.) 409; Bank of Port Jefferson *v.* Darling, 91 Hun, 236; Shoenberger's Executor *v.* Lancaster Savings Institution, 28 Pa. St. 459; Dodson *v.* Taylor, 56 N. J. Law, 11; Massachusetts Bank *v.* Oliver, 10 Cush. 557; Merchants' Bank *v.* Birch, 17 John. 24. See also Boyd's Admr. *v.* City Savings Bank, 15 Gratt. 501; Smalley *v.* Wright, 40 N. J. Law, 471; Goodnow *v.* Warren, 122 Mass. 82; Bealls *v.* Peck, 12 Barb. 245; Cayuga Co. Bank *v.* Bennett, 5 Hill, 236; Maspero *v.* Pedesclaux, 22 La. Ann. 227.

(*b*) Goodnow *v.* Warren, 122 Mass. 82; Merchants' Bank *v.* Birch, 17 Johns. 25; Lindeman's Exr. *v.* Guildin, 34 Pa. St. 54. The mailing of notice of dishonor to an indorser known to be dead, directed to a post office known to be one at which he had not received his mail while living, is not a good notice of dishonor. Merchants' Bank of Canada *v.* Brown, 86 App. Div. (N. Y.) 599.

§ 170. **Notice to partners.**— Where the parties to be notified are partners, notice to any one partner is notice to the firm (*a*), even though there has been a dissolution (*b*).

(*a*) But where partners give a promissory note with one of them as maker and the other as indorser, the latter is not liable on his indorsement unless he be duly notified of the dishonor of the note. Foland *v.* Boyd, 23 Pa. St. 476.

(*b*) Hubbard *v.* Matthews, 54 N. Y. 43, 50; Coster *v.* Thomason, 19 Ala. 717; Sloeomb *v.* Lizardi, 21 La. Ann. 355; Fourth Nat. Bank *v.* Henschuh, 52 Mo. 207; Seldner *v.* Mount Jackson Nat. Bank, 66 Md. 488.

§ 171. **Notice to persons jointly liable.**— Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others (*a*).

(*a*) Shepard *v.* Hawley, 1 Conn. 367; Boyd *v.* Orton, 16 Wis. 495. For the distinction between parties who are partners and

joint parties not partners, see Gates *v.* Beecher, 60 N. Y. 518, 526. See also Willis *v.* Green, 5 Hill, 232. But see Sherer *v.* Easton Bank, 33 Pa. St. 134; Jarnigan *v.* Stratton, 95 Tenn. 619.

§ 172. **Notice to bankrupt.**— Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee (*a*).

(*a*) In Callahan *v.* Kentucky Bank, 82 Ky. 231, it was decided that where the indorser had made a voluntary assignment for the benefit of creditors, notice to the assignee would bind the indorser and his estate. And a similar rule was adopted by the Supreme Court of Tennessee in American Nat. Bank *v.* Junk Bros., 94 Tenn. 634. On the other hand, the Supreme Court of Ohio, in House *v.* Vinton, 43 Ohio St. R., 346, by a majority opinion, declined to adopt this rule, making a distinction between an assignee under a voluntary general assignment and an assignee in bankruptcy. In this latter case, however, there is a strong dissenting opinion by two of the judges of that court, in which the soundness of the rule as announced by the Kentucky court is earnestly insisted upon.

§ 173. **Time within which notice must be given.**— Notice may be given as soon as the instrument is dishonored (*a*); and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

(*a*) The holder need not wait until the close of business hours, but may send notice at once. Bank of Alexandria *v.* Swan, 9 Peters, 33; Lenox *v.* Roberts, 2 Wheat. 373; *ex parte* Moline, 19 Ves. 216; Whitwell *v.* Brigham, 19 Pick. 117; Coleman *v.* Carpenter, 9 Pa. St. 178.

§ 174. **Where parties reside in same place.**— Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times;

1. If given at the place of business of the person to receive

notice, it must be given before the close of business hours on the day following (*a*);

2. If given at his residence, it must be given before the usual hours of rest on the day following (*b*);

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following (*c*).

(*a*) Adams *v.* Wright, 14 Wis. 408; Cayuga County Bank *v.* Hunt, 2 Hill, 236; Marks *v.* Boone, 24 Fla. 177; Bell *v.* Hagerstown Bank, 7 Gill, 216; Daniel on Neg. Insts., section 1038. The notice must follow upon the first demand. Rosson *v.* Carroll, 90 Tenn. 90.

(*b*) Phelps *v.* Stocking, 21 Neb. 444; Darbishire *v.* Parker, 6 East. 8. While service at the place of business must be during business hours, service at the residence is not so regulated. It will be sufficient if made during any of the hours when members of household are attending to their ordinary affairs. Adams *v.* Wright, 14 Wis. 408. If the service is properly made at the place of business or residence, it is immaterial that the party to be notified did not in fact receive the notice. Adams *v.* Wright, 14 Wis. 408.

(*c*) See note to next section.

§ 175. **Where parties reside in different places.**— Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter (*a*).

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision (*b*).

(*a*) Sanderson *v.* Sanderson, 20 Fla. 292; Rosson *v.* Carroll, 90 Tenn. 90; Stephenson *v.* Dickson, 24 Pa. St. 148; Whitwell *v.*

Johnson, 17 Mass. 449. In Smith *v.* Poillon, 87 N. Y. 590, 597, Earl, J., said: "From a careful examination of all these authorities and many others, it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this State. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law." But see Burgess *v.* Vreeland, 4 Zab. (N. J.) 71; Winans *v.* Davis, 3 Harr. (N. J.) 276. Where it is proper to send the notice by the mail, and it has not arrived at as early a date as in the regular course of the mail it might have come if started at the proper time, the onus is upon the plaintiff to prove that it was put in the mail at the proper time. Friend *v.* Wilkinson, 9 Gratt. 31.

(*b*) Bank of Columbia *v.* Lawrence, 1 Peters, 578; Jarvis *v.* St. Croix Mfg. Co., 23 Me. 287.

§ 176. **When sender deemed to have given due notice.**—Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails (*a*).

(*a*) Windham Bank *v.* Norton, 22 Conn. 213; Pier *v.* Heinrichsoffen, 67 Mo. 163; Bell *v.* Hagerstown Bank, 7 Gill, 216; Sasseer

v. Farmers' Bank, 4 Md. 409; Cook v. Foraker, 193 Pa. St. 461. In Shed v. Brett, 1 Pick. 401, 410, it was said: "The mail being established by standing laws of the Government for the purpose principally of facilitating the transmission of mercantile correspondence, it being by far the most usual conveyance of letters and generally the most sure as to time, and safe in every other respect, all men who deal in mercantile paper are presumed to assent, and even expect, that such information as they may want will be communicated in this way. And thus the post-office becomes their agent; and if it happened to fail from any unexpected cause, he who made the right use of it by placing his letter there properly directed has done all his duty, and the consequences must fall upon him who has to receive."

§ 177. **Deposit in post-office; what constitutes.**— Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the post-office department (*a*).

(*a*) See Nat. Bank v. Shaw, 79 Me. 376; Pearce v. Langfit, 101 Pa. St. 507; Johnson v. Brown, 154 Mass. 105; Skilbeck v. Garbett, 7 Q. B. 846. In some cases it has been held that delivery to a letter carrier was sufficient. Pearce v. Langfit, 101 Pa. St. 507; Shoemaker v. Mechanics' Bank, 59 Pa. St. 79. But it was not deemed wise to adopt this rule in the statute.

§ 178. **Notice to subsequent* party; time of.**— Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor (*a*).

(*a*) Howland v. Adrian, 29 N. J. Law, 41; Howard v. Ives, 1 Hill, 263; Jameson v. Swinton, 2 Taunt. 224; Shelburne Falls National Bank v. Townsley, 102 Mass. 177; Seaton v. Scovill, 18 Kans. 435; Haly v. Brown, 5 Pa. St. 178; Etting v. Schuylkill Bank, 2 Pa. St. 355; Struthers v. Blake, 30 Pa. St. 139; Bray v. Hadwen, 5 Maule & Sel. 68; Linn v. Horton, 17 Wis. 150. If the holder of an indorsed bill or note chooses to rely upon the

* Error in egrossing. The word should be "antecedent."

responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given in time, by the other parties, it will enure to the benefit of the holder and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. And it is no objection to such notice that it is not in fact received so soon as the first or any prior indorser, as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he received it. Colt *v.* Noble, 5 Mass. 167; Mead *v.* Engs, 5 Cow. 303; Howard *v.* Ives, 1 Hill, 263. And the same degree of diligence must be exercised on the part of the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. He is not bound to forward notice on the very day upon which he receives it, but may wait until the next. See cases above cited. Service of notice upon an antecedent party is not shown by the mere testimony of the notary that not knowing the address of the indorser he inclosed the notice of dishonor to a subsequent indorser with postage for forwarding the same to the prior indorser. Fuller Buggy Co. *v.* Waldron, 112 App. Div. (N. Y.) 814. The holder of a check indorsed and deposited the same in his bank for collection on July 28th. On July 29th, he was notified by the bank that the check had been dishonored, and on July 30th, he notified the payee by telegraph: — *Held,* that the notice was in due time under this section. Jurgens *v.* Wichmann, 108 N. Y. Supp. 881.

§ 179. **Where notice must be sent.**— Where a party has added an address to his signature, notice of dishonor must be sent to that address (*a*); but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters (*b*); or

2. If he live in one place, and have his place of business in another, notice may be sent to either place (*c*); or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning (*d*).

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section (*e*).

(*a*) Bartlett *v.* Robinson, 39 N. Y. 187. In this case the indorsement was in the following form: "Chas. Robinson, 214 E. 18th Street." The notice of dishonor sent through the post-office was addressed "Chas. Robinson, Esq., City of New York," and was not received by the indorser. *Held*, that he was discharged.

(*b*) Bank of Columbia *v.* Lawrence, 1 Peters, 578; National Bank *v.* Cade, 73 Mich. 449; Northwestern Coal Co. *v.* Bowman, 69 Iowa 150; Mercer *v.* Lancaster, 5 Pa. St. 160; Woods *v.* Neeld, 44 Pa. St. 86; Haly *v.* Brown, 5 Pa. St. 178; Rand *v.* Reynolds, 2 Gratt. 171. But if sufficient inquiries have been made, and information received on which the holder has a right to rely, a mistake as to the nearest or usual post-office does not release the indorser. Moore *v.* Hardcastle, 11 Md. 486. For a case where the indorser received his mail at two post-offices, see Shelburne Falls Nat. Bank *v.* Townsley, 107 Mass. 444. A notice addressed to the indorser at "New York" is insufficient where there is no evidence that he lived, ever had lived, or was sojourning in New York, and no inquiry was made to ascertain whether such was the fact. Fonseca *v.* Hartman, 84 N. Y. Supp. 131.

(*c*) Bank of U. S. *v.* Carneal, 2 Peters, 549; Williams *v.* Bank of U. S., 2 Peters, 96; Montgomery Co. Bank *v.* Marsh, 7 N. Y. 481. The rule that notice might be served at the place of business, as well as at the residence, was not changed by the former statute of Wisconsin, Laws 1861, Ch. 79. Simus *v.* Larkin, 19 Wis. 390.

(*d*) Chouteau *v.* Webster, 6 Mete. 1; Young *v.* Durgin, 15 Gray, 264; Bigley's Adm'r *v.* Cluff, 16 Gratt. 284, 291–292. The stability of residence acquired under laws relating to taxation and the settlement of paupers is not necessary when ascertaining the abode of an indorser for the purpose of giving him notice of dishonor by mail. He may have a residence for this purpose at two places at the same time, and, in such case, notice to him at either place will be sufficient. Lowell Trust Company *v.* Pratt, 183 Mass. 379, 381.

(*e*) Although the residence or place of business is the usual and

proper place for giving notice, it will be good if actually given anywhere. Dickens *v.* Hall, 87 Pa. St. 379, 380. If the party to be charged receives the notice in due time he cannot object to the means employed. Terbell *v.* Jones, 15 Wis. 235; Whitford *v.* Burckmeyer, 1 Gill, 127. But if the holder employs other means than the mail he does so at his own risk. (*Id.*) Notice sent by telegraph, for example, would undoubtedly be sufficient if actually received, and an omission to post the notice in due season might be corrected in this way. See section 175.

§ 180. **Waiver of notice.**—Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice (*a*), and the waiver may be express or implied (*b*).

(*a*) Robinson *v.* Barnett, 19 Fla. 670. The statute has not changed the law respecting waiver. First Nat. Bank *v.* Gridley, 112 App. Div. (N. Y.) 398. If an indorser with full knowledge of the laches of the holder in neglecting to protest a bill or note, unequivocally assents to continue his liability, or to be responsible, as though due protest had been made, he is held to have waived the right to object, and will stand in the same position as if he had been regularly charged by presentment, demand and notice. This assent must be clearly established, and will not be inferred from doubtful or equivocal acts or language. It has been frequently held that a promise by the indorser to pay the note or bill, after he has been discharged by the failure to protest it, will bind the indorser, provided he had full knowledge of the laches when the promise was made. A promise made under those circumstances affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder; and the law, without any new consideration moving between the parties, gives effect to the promise. The assent of the indorser to be bound, notwithstanding he has not been duly charged, may be established by any transaction between him and the holder, which clearly indicates this purpose and intention. Ross *v.* Hurd, 71 N. Y. 14, 18; Turnbull *v.* Maddux, 68 Md. 579; Lewis *v.* Brehme, 33 Md. 412; Bank *v.* Dibbrell, 91 Tenn. 301; Low *v.* Howard, 10 Cush. 159; Smith *v.* Lownsdale, 6 Oregon 78; Whittaker *v.* Morrison, 1 Fla. 25. But it must appear in such case that the in-

dorser had knowledge of the fact that the holder was in default. Thornton *v.* Wynn, 12 Wheat. 183; Hunter *v.* Hook, 64 Barb. 469; Gawtry *v.* Doane, 48 Barb. 148; Schierl *v.* Baumel, 75 Wis. 75; Glaser *v.* Rounds, 16 R. I. 235; Aebi *v.* Bank of Evansville, 124 Wis. 73, 81. And in Massachusetts it is held that knowledge on the part of an indorser that demand upon the maker has not been made is material, and must be proved, notwithstanding the fact that he knew that the note had not been paid and that notice of non-payment had not been given, and was aware that he was discharged from all liability. Parks *v.* Smith, 155 Mass. 26, 33; Garland *v.* Salem Bank, 9 Mass. 408; Low *v.* Howard, 10 Cush. 159; S. C., 11 Cush. 268; Kelley *v.* Brown, 5 Gray, 108. But where the indorser is fully apprised of the facts, he is bound by the waiver, though made in ignorance of its legal effect. Toole *v.* Crafts, 193 Mass. 110. Under the statute, as before, where presentment for payment is waived notice of dishonor is dispensed with. Baumeister *v.* Kuntz (Fla.), 42 So. Rep. 886; Dye *v.* Scott, 35 Ohio St. 194.

(*b*) Jenkins *v.* White, 147 Pa. St. 303. A waiver will not be presumed without the most satisfactory proof. Lockwood *v.* Crawford, 18 Conn. 374. But it is not essential that the waiver be in writing. When the fact is established by competent evidence, a parol waiver is as valid and binding as a written one. The only difference is in the character of the proof. Annville National Bank *v.* Kettering, 106 Pa. St. 531, 534. A part payment of a note by an indorser, not explained or qualified by any accompanying circumstances, will be held to be sufficient evidence of waiver of notice. Whittaker *v.* Morrison, 1 Fla. 25. As to whether an indorser who has taken sufficient security to protect himself against possible loss waives his legal right to require proof of demand and notice, the authorities are not agreed. Smith *v.* Lownsdale, 6 Ore. 78; Haskell *v.* Boardman, 8 Allen, 38; Moore *v.* Alexander, 63 App. Div. 100; Mechanics' Bank *v.* Griswold, 7 Wend. 165; Brown *v.* Maffey, 15 East. 222. As to when question of waiver is for the jury, see Valley Nat. Bank *v.* Uhler, 191 Pa. St. 356; Jones *v.* Roberts, 191 Pa. St. 152. The facts constituting the waiver must be alleged in the pleading. Congress Brewing Co. *v.* Habenicht, 83 App. Div. (N. Y.) 141.

§ 181. **Whom affected by waiver.**—Where the waiver is embodied in the instrument itself, it is binding upon all par-

ties (*a*); but where it is written above the signature of an indorser, it binds him only (*b*).

(*a*) Phillips *v.* Dippo, 93 Iowa 35; Smith *v.* Pickham, 8 Tex. Civ. App. 326; Bryant *v.* Merchants' Bank, 8 Bush. 43; Lowry *v.* Steele, 27 Ind. 168; Farmers' Bank of Kentucky *v.* Ewing, 78 Ky. 264; Bryant *v.* Taylor, 19 Minn. 396.

(*b*) Woodman *v.* Thurston, 8 Cush. 157; Farmers' Bank *v.* Ewing, 78 Ky. 264.

§ 182. **Waiver of protest.**— A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor (*a*).

(*a*) First Nat. Bank *v.* Falkenham, 94 Cal. 141. While in a strict and technical sense the term protest when used in reference to commercial paper means only the formal declaration drawn up and signed by a notary; yet in a popular sense, and as used among men of business, it includes all the steps necessary to charge an indorser; and in waiving protest an indorser is supposed to use in it this sense. Coddington *v.* Davis, 1 N. Y. 186, 189–190; Annville Nat. Bank *v.* Kettering, 106 Pa. St. 531; First Nat. Bank *v.* Schreiner, 110 Pa. St. 188; Continent Life Ins. Co. *v.* Barber, 50 Conn. 567; Brewster *v.* Arnold, 1 Wis. 264; Wilkie *v.* Chandon, 1 Wash. 355. But the waiver will not be extended beyond the fair import of the terms; and hence, a waiver of "notice of protest" will not be deemed a waiver of demand. Sprague *v.* Fletcher, 8 Oregon 367. In construing a pleading a more technical rule will be applied, and an allegation that the instrument was duly protested will not be held to comprehend an averment that notice of dishonor was given to the indorser. Cook *v.* Warren, 88 N. Y. 37.

§ 183. **When notice is dispensed with.**— Notice of dishonor (*a*) is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged (*b*).

(*a*) The fact that the holder is excused from making presentment for payment under section 136 because the principal obligor

is dead, does not relieve him from the duty of giving notice of dishonor to the indorser. Reed *v.* Spear, 107 App. Div. (N. Y.) 144.

(*b*) Hobbs *v.* Straine, 149 Mass. 212; Staylor *v.* Ball, 24 Md. 183; Reed *v.* Spear, 107 App. Div. (N. Y.) 144; Fonseca *v.* Hartman, 84 N. Y. Supp. 131; Siegel *v.* Dubinsky, 56 Misc. (N. Y.) 681. Reasonable diligence is all that is required. The law does not exact every possible exertion which might have been made to effect notice of the dishonor of the paper. Bank of Port Jefferson *v.* Darling, 91 Hun, 236. But, as said by Lord Ellenborough, the holder cannot allow himself to remain "in a state of passive and contented ignorance." Bateman *v.* Joseph, 2 Campb. 461. What is reasonable diligence will depend upon the circumstances of each case. What would be sufficient in one case might fall short in another. Howland *v.* Adrian, 29 N. J. Law, 41. And any mode of inquiry will be sufficient which under the circumstances of the case evinces reasonable diligence. Hartford Bank *v.* Stedman, 3 Conn. 494. But bare reliance upon a directory is not sufficient. Bacon *v.* Hanna, 137 N. Y. 379, 382. In the case last cited, the court said: "Merely looking into a directory is not enough. The sources of error in that process are too many and too great. Such books are accurate enough in a general way, and convenient as an aid or assistance, but they are private ventures, created by irresponsible parties, and depending upon information gathered as cheaply as possible and by unknown agents. Their help may be invoked, but, as was said in Lawrence *v.* Miller, 16 N. Y. 231, their error may excuse the notary, but will not charge the defendant. Merely consulting them should not be deemed 'the best information obtained by diligent inquiry.' Greenwich Bank *v.* DeGroot, 7 Hun, 210; Baer *v.* Leppert, 12 Hun, 516." If the holder is ignorant of the address he should apply to the other parties to the instrument for information. University Press *v.* Williams, 48 App. Div. (N. Y.) 190. When a notary is employed, it is the duty of the holder to inform him of the indorser's place of residence; and if this be omitted, the notary ought to apply to all the parties to the instrument for information, and especially to the holder himself. Hill *v.* Farrell, 3 Greenleaf, 233; Haly *v.* Brown, 5 Pa. St. 178, 182; Tate *v.* Sullivan, 30 Md. 464; Staylor *v.* Ball & Williams, 24 Md. 183. But as the duty to give notice, and therefore the duty of due diligence to discover the residence of the indorser, arises subsequently to the dishonor of

the note, it is not an element of due diligence that the owner should previously have communicated his knowledge of the indorser's residence to the holder for collection. Bartlett *v.* Isbell, 31 Conn. 297. Where it does not appear that the residence of the indorser has been changed previously to the time of sending the notice, it will be presumed that there has been no change of residence up to that time. Mohlman Co. *v.* McKane, 60 App. Div. 546 (a case arising under the statute). Where the facts are undisputed the question of due diligence in seeking to give notice of dishonor is for the court. Haly *v.* Brown, 5 Pa. St. 178.

§ 184. **Delay in giving notice; how excused.**— Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence (*a*).

(*a*) In Martin *v.* Ingersoll, 8 Pick. 1, the delay was caused by the fact that during the Christmas holidays vessels were not allowed to clear from Havana. *Held,* that during the continuance of the holidays it was not necessary to write a notice of the dishonor of a bill.

§ 185. **When notice need not be given to drawer.**— Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person (*a*);

2. Where the drawee is a fictitious person or a person not having capacity to contract;

3. Where the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument (*b*);

5. Where the drawer has countermanded payment.

(*a*) Roach *v.* Ostler, 1 Man. & Ry. 120; Planters' Bank *v.* Evans, 36 Tex. 592; Chicago, etc., R. R. Co. *v.* West, 37 Ind. 211.

When the drawer and the drawee are the same in contemplation of law, the rule applicable to such draft is, that in legal operation it is regarded as a promissory note, payable on demand, and the maker thereof is not entitled to notice. Bailey *v.* Southwestern R. R. Bank, 11 Fla. 266. Notice is not required to render a firm liable where all the members of the firm are members of the house which drew the bill. West Branch Bank *v.* Fulner, 3 Pa. St. 399.

(*b*) Life Insurance Company *v.* Pendleton, 112 U. S. 708; Wollenweber *v.* Ketterlinn, 17 Pa. St. 389. Although the drawer has no funds in the hands of the drawee, yet if he has a right to expect to have funds in the hands of the drawee to meet the bill, or if he has a right to expect the bill to be accepted by the drawee in consequence of an agreement or an arrangement with him, or if upon taking up the bill he would be entitled to sue the drawee or any other party to the bill, then in every such case he is entitled to strict notice of dishonor. Pitts *v.* Jones, 9 Fla. 519.

§ 186. **When notice need not be given to indorser.**—Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument (*a*).

2. Where the indorser is the person to whom the instrument is presented for payment (*b*);

3. Where the instrument was made or accepted for his accommodation (*c*).

(*a*) See note to section 28.

(*b*) In re Swift, 106 Fed. Rep. 65 (a case arising under the statute).

(*c*) French *v.* Bank of Columbia, 4 Cranch, 141; Ross *v.* Bedell, 5 Duer, 462; Blenderman *v.* Price, 50 N. J. L. 296; Torrey *v.* Frost, 40 Me. 74. Where one, as indorser, procures the note of another to be discounted by a bank for his credit, and at the time the discount is effected makes a distinct promise to the bank to pay the note at maturity, his liability is absolute, not condi-

tional, and protest and notice of non-payment are unnecessary. Sieger *v.* Second National Bank, 132 Pa. St. 307.

§ 187. **Notice of non-payment where acceptance refused.** — Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted (*a*).

(*a*) De la Torre *v.* Barclay, 1 Stark, 308; Campbell *v.* French, 6 T. R. 200.

§ 188. **Effect of omission to give notice of non-acceptance.**—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

§ 189. **When protest need not be made; when must be made.**— Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange (*a*).

(*a*) Bay *v.* Church, 15 Conn. 129; Legg *v.* Vinal, 165 Mass. 555; Tate *v.* Sullivan, 30 Md. 464; Weems *v.* Farmers' Bank, 15 Md. 231; Ricketts *v.* Pendleton, 14 Md. 320; Sumner *v.* Kimball, 2 Wis. 524; Stephenson *v.* Dickson, 24 Pa. St. 148. Under this section the drawer of a foreign bill is discharged unless the bill be protested. Amsinck *v.* Rogers, 189 N. Y. 252; S. C., 103 App. Div. 428. While protest is not necessary, except in case of foreign bills, it is very convenient in all cases, because it affords the easiest and most certain method of proving the fact of dishonor and the notice to the indorsers. Under the statutes of nearly all, if not all of the States, the certificate of the notary making the protest is *prima facie* evidence of these facts. As to what are foreign bills, see section 213. For other provisions relative to protest, see sections 260–268.

ARTICLE IX.

Discharge of Negotiable Instruments.

Section 200. Instrument; how discharged.
201. When person secondarily liable on, discharged.
202. Right of party who discharges instrument.
203. Renunciation by holder.
204. Cancellation; unintentional; burden of proof.
205. Alteration of instrument; effect of.
206. What constitutes a material alteration.

§ 200. **Instrument; how discharged.***—A negotiable instrument is discharged:

1. By payment (*a*) in due course by or on behalf of the principal debtor (*b*);

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder (*c*);

4. By any other act which will discharge a simple contract for the payment of money (*d*);

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right (*e*).

(*a*) The possession of a bill of exchange by the acceptor after it has been in circulation is *prima facie* evidence that it has been paid by him. Baring *v.* Clark, 19 Pick. 220. So the possession of a promissory note by the maker. First Nat. Bank *v.* Harris, 7 Wash. 139; Perez *v.* Bank of Key West, 36 Fla. 467. But see

* Through an error in engrossing the words in the headnote have been transposed. It was intended to read. "How instrument discharged." The error was not corrected by the Act of 1898.

Miller *v.* Kreiter, 76 Pa. St. 78; Eckert *v.* Cameron, 7 Wright, 120. When the holder of a bill of exchange, accepted for the accommodation of the drawer, sends it to a bank for collection, and the bank, when the bill comes to maturity, pays the amount thereof to the credit of the holder, this is not such a payment as discharges the acceptor; but the bank succeeds to the right of the holder, and may maintain an action on the bill against the acceptor. Pacific Bank *v.* Mitchell, 9 Met. 297. The surrender of a genuine note of a town in exchange for an instrument purporting to be a renewal note forged by the treasurer of the town does not extinguish the surrendered note, which, although not to be found, still can be sued upon by the holder thus induced to give it up. Bass *v.* Inhabitants of Wellesley, 192 Mass. 526. Where the defendant admits the execution of a note, the burden of showing payment is on him. Guano Company *v.* Marks, 135 N. C. 59.

(*b*) A payment made to the holder of a promissory note by an indorser, not as agent for the maker, but simply in discharge of his obligation as indorser, where the note was executed by the maker for value, does not enure to the benefit of the latter, and in an action upon the note he is liable for the whole amount thereof, notwithstanding the payment. Madison Square Bank *v.* Pierce, 137 N. Y. 444. In the case cited it was said: "To the extent of the money paid, the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes, *pro tanto,* the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and ownership." For cases where payment made by person secondarily liable, see section 202.

(*c*) See section 204.

(*d*) Thus, the release of one joint maker will operate to discharge the other joint parties. Crawford *v.* Roberts, 8 Oregon 324. But to have this effect the release must be under seal. Shaw *v.* Pratt, 22 Pick. 305.

(*e*) Statute applied in Schwartzman *v.* Post, 94 App. Div. (N. Y.) 474, 477. The words "in his own right" merely exclude such a case as that of a maker acquiring the instrument in a

purely representative capacity. (*Id.*) If he should become the holder in a representative capacity, for example, as executor, the instrument would not be discharged. Nash *v.* DeFreville (1900), 2 Q. B. 72. See section 80.

§ 201. **When persons secondarily liable on, discharged.** —A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party (*a*);

4. By a valid tender of payment made by a prior party (*b*);

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved (*c*);

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument* (*d*), unless the right of recourse against such party is expressly reserved (*c*).

(*a*) Shutts *v.* Fingar, 100 N. Y. 539; Spies *v.* National City Bank, 174 N. Y. 222; Couch *v.* Waring, 9 Conn. 261; Gennis *v.* Weighley, 114 Pa. St. 194. It is a general rule that whatever discharges the maker or acceptor discharges the drawer and indorser, who are sureties, for the contract which they undertook to assume thus passes out of existence by the act of the beneficiary. And whatever discharges a prior indorser discharges all subsequent indorsers, for the reason that he stood between them and the holder, and on making payment each one could have had recourse against him, but from which his discharge precludes them. The contracts of the parties are said to be like the links of a pendant chain; if the holder dissolves

* By an error in engrossing, the words "unless made with the assent of the party secondarily liable, or" after the word "instrument" are omitted in the New York Act. They were not supplied by Laws 1898, Chap. 336. These words are included in the section as passed in all the other states.

the first, every link falls with it. Shutts *v.* Fingar, *supra.* But this rule, of course, does not apply where a prior party has been discharged by the laches of the intermediate indorser; for the holder need give notice only to his immediate indorser. West River Bank *v.* Taylor, 34 N. Y. 128, 131. And after the responsibility of an indorser has been fixed no act or dealing of the holder with the maker will discharge the indorser, except it be such an act as will defeat, impair or delay the right of the indorser, on paying the note, to recover against the maker. Farmers' Bank *v.* Sprigg, 11 Md. 390. Where the holder of a note, with several indorsers in blank, sues the maker and writes over the name of the first indorser an order to pay to himself, the holder, but without striking out the names of the subsequent indorsers, he does not thereby discharge them, and therefore one of them who pays the amount of the note to the holder may sue any of the prior parties. Cole *v.* Cushing, 8 Pick. 48. An indorser is discharged where the holder has allowed the statute of limitations to run against the maker. Shutts *v.* Fingar, 100 N. Y. 539.

(*b*) Spurgeon *v.* Smiths, 114 Ind. 433.

(*c*) By an express reservation of the holder's rights against the drawer or indorsers, their rights against the maker or acceptor are reserved by implication. Gloucester Bank *v.* Worcester, 10 Pick. 528; Tombeckbe Bank *v.* Stratton, 7 Wend. 429; Stewart *v.* Eden, 2 Cai. 121. The giving of a judgment or other security by the maker or a prior indorser does not discharge a subsequent indorser. First Nat. Bank *v.* Peltz, 176 Pa. St. 513; Guarantee Co. *v.* Craig, 155 Pa. St. 343.

(*d*) Statute applied in Deahy *v.* Choquet (R. I.) 67 Atl. Rep. 421. Any extension, no matter how short, by a valid agreement, will discharge the indorser or surety. Cary *v.* White, 52 N. Y. 138; Nightingale *v.* Meginnis, 34 N. J. Law, 461; Siebeneck *v.* Anchor Savings Bank, 111 Pa. St. 187; *In re* Bishop's Estate, 195 Pa. St. 85; Friedenberg *v.* Robinson, 14 Fla. 130. But there must be an enforcible agreement to this effect, either expressed or implied. (*Id.*) Ordinarily the taking of a new note from the debtor, payable at a future day, suspends the right of action upon the original demand until the maturity of the new note, and hence discharges a non-assenting surety. Hubbard *v.* Gurney, 64 N. Y. 450; Place *v.* McIlvain, 38 N. Y. 960; Fridenberg *v.* Robinson, 14 Fla. 130. But when the new security is payable on demand no presumption arises of an agreement. Board of

Education *v.* Fonda, 77 N. Y. 350, 362. And where new security is taken merely as collateral, the fact that the collateral may not be enforcible until a definite time in the future does not operate to extend the time of payment of the principal debt or suspend the right to sue on the original security. Falkill National Bank *v.* Sleight, 1 App. Div. 189, 191; United States *v.* Hodge, 6 How. (U. S.) 279. Mere indulgence to the maker or acceptor will not discharge a drawer or indorser; there must be an agreement to extend the time of payment binding upon the holder. Smith *v.* Erwin, 77 N. Y. 466; Bank of Utica *v.* Ives, 17 Wend. 501; Crawford *v.* Millspaugh, 13 Johns. 87; Lockwood *v.* Crawford, 18 Conn. 376; Friedenberg *v.* Robinson, 14 Fla. 130. And for this purpose the contract must be supported by a valid consideration. Cary *v.* White, 52 N. Y. 138. A part payment by the maker is not such a consideration, Halliday *v.* Hart, 30 N. Y. 474; nor is an agreement to pay interest, since it is merely a promise to do what the party is already bound to do. Wilson *v.* Powers, 130 Mass. 127; Stuber *v.* Schack, 83 Ill. 192. An indorser is not discharged by extending the maker's time to answer. German-Am. Bank *v.* Niagara Cycle Co., 13 App. Div. (N. Y.) 450.

The ground upon which an agreement to give time to the maker, made by the holder without the consent of the indorsers, upon a valid consideration, is held to be a discharge of the indorsers, is solely this, that the holder thereby impliedly stipulates not to pursue the indorsers, or to seek satisfaction from them in the intermediate period. It can never apply to any case where a contrary stipulation exists between the parties. Hence, if the agreement for delay expressly saves and reserves the rights of the holder in the intermediate time against the indorsers, it will not discharge the latter. In such case the very ground of the objection is removed, for their rights are not postponed against the maker if they should take up the note. Hagey *v.* Hill, 75 Pa. St. 108, 111. The burden of showing that the indorser assented to such extension of time is on the party seeking to charge him. Siebeneck *v.* Anchor Savings Bank, 111 Pa. St. 187.

(*c*) Wagman *v.* Hoag, 14 Barb. 233, 239; Rockville National Bank *v.* Holt, 58 Conn. 526; Bank v. Simpson, 90 N. C. 469; Minir *v.* Crawford, L. R. 2 Scotch Appeals, 456; Kenworthy *v.* Sawyer, 125 Mass. 28; Morse *v.* Huntington, 40 Vt. 488; Hagey *v.* Hill, 75 Pa. St. 108. In the previous editions of this work, the author expressed the opinion that, under the statute, an

accommodation maker will not be discharged by an extension of time granted to the indorser, for the reason that a maker, even for accommodation, is, by virtue of section three, primarily liable upon the instrument. And this view has been adopted by the Court of Appeals of Maryland and the Supreme Court of Oregon. Vanderford *v.* Farmers & Mechanics Nat. Bank, 66 Atl. Rep. 47; 10 L. R. Ann. N. S. 129; Cellers *v.* Lyons, 89 Pac. Rep. 426; 10 L. R. Ann. N. S. 133. In the Maryland case, it was said: "Since the passage of the negotiable instruments law, this is the first time that the precise question raised by the pleadings in this case has been presented to this court for decision; but the intention of the legislature, as expressed in the section of the Code we have quoted, would seem to be obvious. That intention is to be ascertained by the words used to express it; and when its meaning, as gathered from the words employed, is plain and intelligible, the court should give it effect. When the legislature has declared, as it has done in these sections, that a negotiable instrument signed by a party who is primarily liable thereon, as that liability is defined by the act, may be discharged in one of the five specified methods, it would seem plain that it meant that the particular method prescribed for the accomplishment of that result should exclude a discharge by any other, or different, method, upon the familiar maxim that the express mention of one thing implies the exclusion of another." And in the Oregon case, the court said: "What is expressed in an act is deemed exclusive, when it is creative, or in derogation of some existing law, or of some of the provisions of a particular act. 2 Sutherland, Stat. Constr. Lewis's 2d Ed. § 491. It is indicated in the title of the act under consideration that its purpose is "to establish a law uniform with the laws of other States on that subject." Inasmuch as the enactments relating to negotiable instruments differed in the various States, and as the decision interpreting both the common-law and legislative provisions were far from being harmonious, it must be inferred, from the language constituting the title of the act, that it was intended to provide a complete and comprehensive law on this subject; and, since it defines an accommodation maker, making him primarily liable, and in one section designates how negotiable instruments may be discharged, but contains no provision whereby a person primarily liable can be released, except by payment, etc., and in the section following specifies the manner in which persons secondarily liable

may be relieved of responsibility on such instrument, it follows that the immunities indicated there were intended to exclude all exceptions not contained therein, under the familiar maxim: *Expressio unius est exclusio alterius.* It is therefore clear, under the well settled rules governing the construction of statutes, that when this act, which, in effect, declares that all persons signing a negotiable instrument shall be liable, whether executed for a valuable consideration or as an accommodation maker, and then specifies the particular manner in which negotiable instruments may be discharged, designating, as an exception thereto, that, when the liability is secondary, it may be avoided by any valid agreement extending the time of payment, etc., without such person's consent, was passed, it was the intention of the legislative assembly to make such provisions exclusive of all others." A similar view was taken in New York by the Appellate Division, First Department, in National Citizens' Bank *v.* Toplitz (81 App. Div. 593) which, however, was affirmed in the Court of Appeals on other grounds. (178 N. Y. 466.) See also Delaware County Trust Co. *v.* Title Ins. Co. 199 Pa. St. 17.

§ 202. **Right of party who discharges instrument.**— Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, (*a*) and he may strike out his own and all subsequent indorsements, and again negotiate the instrument (*b*), except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated (*c*).

(*a*) The application of this section is necessarily limited to cases where the person secondarily liable can trace his title through the prior parties to the party whom he seeks to hold. If, when remitted to his former rights, he would have no cause of action against any party to the paper, payment by him discharges the instrument. Quimby *v.* Varnum, 190 Mass. 211.

(*b*) Where an indorser takes up the instrument, after it has been dishonored, by paying the amount of it to the holder, the transac-

tion is in effect a repurchase of the paper, and not a payment of it, and the indorser becomes vested again with all the rights which he formerly had against prior parties. French *v.* Jarvis, 29 Conn. 347. And the paper retains its negotiable character. Gould *v.* Eager, 17 Mass. 615; Davis *v.* Miller, 14 Gratt. 1. And although in the case of accommodation paper the indorsee may not pay actual value at the time of his indorsement, yet if he pays the instrument and gets possession of it he is deemed a holder. Reinhart *v.* Schall, 69 Md. 352. It is necessary to strike out all subsequent indorsements; for after the paper has once been paid it cannot be negotiated again if such negotiation would make any of the parties liable who would otherwise be discharged. Goodner *v.* Maynard, 7 Allen, 456; Citizens' Bank *v.* Say, 80 Va. 436. And by putting the note in circulation again the liability of subsequent parties is not revived. Davis *v.* Miller, 14 Gratt. 1. A note coming into the hands of the maker under such circumstances as to raise a presumption of its payment cannot be pledged by him as collateral so as to bind a surety, although the note may not have matured at the time of its reissue. First National Bank *v.* Harris, 7 Wash. 139. Where payment is made by the second indorser, the case is within the provisions of this section. Twelfth Ward Bank *v.* Brooks, 63 App. Div. (N. Y.) 220. Possession of the paper by an indorser, after its protest for non-payment, is *prima facie* evidence that he has performed his contract of endorsement, and has paid to the holder the amount due. Hill *v.* Buchanan, 71 N. J. L. 301. See section 200.

(*c*) Cottrell *v.* Watkins, 89 Va. 801. Where the instrument is paid by an accommodation acceptor it is discharged, and becomes commercially dead, but is evidence in the hands of the payer to charge the real debtor. First Nat. Bank *v.* Maxfield, 83 Me. 576. So, where one of several accommodation makers pays the note, it remains in his hands evidence of his right to contribution from his co-sureties. This right may be assigned by him, and the delivery of the note by him to a third person for a valuable consideration raises a presumption of an intention to pass this right to the transferee. Dillenbeck *v.* Bygert, 97 N. Y. 303. Where an accommodation indorser for the payee has paid the note he may recover the amount of an accommodation maker. Laubach *v.* Pursell, 35 N. J. Law, 434. And where a second indorser of a note has paid and taken it up he becomes a holder for value, and may maintain an action to recover the amount

thereof of the first indorser, although both are accommodation indorsers. Kelly *v.* Burroughs, 102 N. Y. 93. See also Kaschner *v.* Conklin, 40 Conn. 81. See section 118.

§ 203. **Renunciation by holder.**— The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the prinpal debtor made at or after the maturity of the instrument, discharges the instrument (*a*). But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon (*b*).

(*a*) In Leask *v.* Dew, 102 App. Div. (N. Y.) 529, 534, it was said by Hatch, J.: "There is some obscurity in the provisions of our statute. In its first sentence it provides for the renuneiation of the rights of the holder against any party to the instrument which may be made before, at or after its maturity. In the second sentence it provides for an absolute and unconditional renunciation of the rights of the holder against the principal debtor at or after the maturity of the instrument, which discharges the instrument. The first relates to the party; the second to the instrument. It is somewhat difficult to see how there could be an absolute discharge of a party to an instrument without discharging the instrument as an obligation so far as he is concerned. We do not clearly perceive why this distinction should have been made." But upon reflection, it will be seen that the distinction is indispensable. If the party in whose favor the renunciation is made is only secondarily liable, then only he and parties subsequent to him are discharged, and the instrument still remains in force as to prior parties. See section 201, subdivision 3. But when the holder renounces his rights against the person primarily liable, then the instrument itself is discharged. The learned judge writing as above-mentioned evidently had in mind the facts of the case before the court, where the maker was the only party to the paper, and he thus failed to note the situation which will arise where there are a number of indorsers. Thus, if a bill drawn by A and accepted by B, should be indorsed

by C and D, a renunciation in favor of D would discharge him only, and a renunciation in favor of C would discharge only C and D; but a renunciation in favor of B, the acceptor, would discharge the instrument.

(*b*) Baldwin *v.* Daly, 41 Wash. 416. After a testator's death, there was found among his papers, inclosed in an envelope, a promissory note payable to him and an instrument signed by him and addressed to his executors stating, "Gentlemen.— The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it, I wish you to notify my heirs that it is my wish and orders:"— *Held*, that this was not a renunciation within the statute. Leask *v.* Dew, 102 App. Div. (N. Y.) 529.

§ 204. **Cancellation; unintentional; burden of proof.**— A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority (*a*).

(*a*) Upon the trial, the signature of the indorser appeared to have been cancelled, and the plaintiff claimed that it was cancelled without authority:— *Held*, that, under the statute, the burden of showing this was on the plaintiff. McCormick *v.* Shea, 50 Misc. (N. Y.) 592.

§ 205. **Alteration of instrument; effect of.**— Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers (*a*). But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor (*b*).

(*a*) See Jeffrey *v.* Rosenfeld, 179 Mass. 596, where the effect of this provision was discussed, but not decided. The burden of

explaining an apparent alteration is upon the party producing the paper. Gowdey *v.* Robbins, 3 App. Div. 353; Ofenstein *v.* Bryan, 20 App. Cas. D. C. 1; Town of Solon *v.* Williamsburgh Savings Bank, 114 N. Y. 122, 135; Simpson *v.* Davis, 119 Mass. 269; Gettysburg National Bank *v.* Chisolm, 169 Pa. St. 564; Citizen's Nat. Bank *v.* Williams, 174 Pa. St. 66; Paine *v.* Edsell, 19 Pa. St. 178. If the paper appears to have been altered he must explain this appearance; but if, on the other hand, however material in fact the alteration may be, there is upon the face of the paper no evidence or mark raising a suspicion thereof, the holder is not called upon to make an explanation or to introduce any testimony until the alteration has been shown by sufficient evidence outside of the paper. Harris *v.* The Bank of Jacksonville, 20 Fla. 501, 512.

(*b*) Statute applied in Thorpe *v.* White, 188 Mass. 333; Moskowitz *v.* Deutsch, 46 Misc. (N. Y.) 602. See also Willis *v.* Wilson, 3 Oregon, 308. A note made and dated in Ohio and indorsed in New York was afterwards altered by the payee by adding the words "with interest at eight per cent. per annum after due until paid" and after such alteration was discounted by a bank in Cleveland:— *Held* that the indorsement being a New York contract, the indorser was liable under this section. Colonial Nat. Bank *v.* Duerr, 108 App. Div. (N. Y.) 215. In Smith *v.* State Bank, 104 N. Y. Supp. 750, an accommodation indorser was held liable to a bank paying the same for the difference between the check as originally drawn and the amount to which it was raised. But the statute does not apply where the paper never had a legal inception, or where the name of the payee was changed before delivery. First Nat. Bank *v.* Gridley, 112 App. Div. (N. Y.) 398. The fact that the indorser's name was struck out by his representative in the plaintiff's presence, may be considered in determining whether the cancellation was unauthorized or consented to. McCormick *v.* Shea, 50 Misc. 592.

This section changes the law in some States. Prior to the statute the rule in many jurisdictions was that where the alteration was made without the consent of the party sought to be charged, there could be no recovery even by an innocent holder for value, and even though he sought to recover on the instrument as it was before the alteration. Gettysburg National Bank *v.* Chisolm, 169 Pa. St. 564; Hartley *v.* Carboy, 150 Pa. St. 23; Wood *v.* Steele, 6 Wall. 80; Citizens' National Bank *v.*

Richmond, 121 Mass. 110. In the case first cited it was said: "In the present case the alteration was not probably made by an agent of the payee, and it was entirely without the knowlenge and consent of the defendant, who was the maker of the note. Of course the payee could not recover on the note for any amount, because it was an altered instrument, and is avoided altogether by public policy. Certainly he could not restore life to it by passing it over to an indorsee." But compare Gleason *v.* Hamilton, 138 N. Y. 353; Town of Solon *v.* Williamsburgh Savings Bank, 114 N. Y. 122, 134. In cases of mere spoliation, where the original tenor was apparent upon inspection, it has been held sufficient to declare on the instrument in such form, and upon the spoliation being shown, there is no variance between the allegation and the proof. Drum *v.* Drum, 133 Mass. 566. A similar rule would now seem to apply where there was proof that the plaintiff was not a party to the alteration. Whether the holder of a note originally stated to be payable "with interest," no rate being named, and altered by the insertion of the words "seven per cent," must declare on the note as it was before the alteration in order to recover interest upon it at six per cent., *quaere.* Massachusetts National Bank *v.* Snow, 187 Mass. 160.

§ 206. **What constitutes a material alteration.**— Any alteration which changes:

1. The date (*a*);

2. The sum payable, either for principal (*b*) or interest (*c*);

3. The time (*d*) or place (*e*) of payment;

4. The number or the relations of the parties (*f*);

5. The medium or currency in which payment is to be made (*g*);

Or which adds a place of payment where no place of payment is specified (*h*), or any other change or addition which alters the effect of the instrument in any respect, is a material alteration (*i*).

(*a*) National Ulster County Bank *v.* Madden, 114 N. Y. 280; Crawford *v.* West Side Bank, 100 N. Y. 50, 56; Moskowitz *v.*

Deutsch, 46 Misc. (N. Y.) 603; Wood *v.* Steele, 6 Wall. 80; Newman *v.* King, 54 Ohio St. 273.

(*b*) Batchelder *v.* White, 80 Va. 103. This is so, though the amount is lessened, as where $500 was changed to $400. Hewins *v.* Cargill, 67 Me. 554.

(*c*) Gettysburg National Bank *v.* Chisolm, 169 Pa St. 564. In this case the words "with interest at six per cent." were interlined. In Colonial Nat. Bank *v.* Duer, 108 App. Div. (N. Y.) 215, the words "with interest at eight per cent. per annum after due until paid" were added.

(*d*) Rogers *v.* Vosburgh, 87 N. Y. 208; Weyman *v.* Yeomans, 84 Ill. 403; Miller *v.* Gilleland, 19 Pa. St. 119.

(*e*) Tidmarsh *v.* Grover, 1 Maule & S., 735; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392.

(*f*) Hoffman *v.* Planters' Nat. Bank, Va. (a case arising under the statute). In McCaughey *v.* Smith, 27 N. Y. 39, and Brownell *v.* Winnie, 29 N. Y. 400, it was held that the addition of another name as maker, where there was but one, was not a material alteration, the additional maker being regarded as a guarantor. The statute has probably changed this rule.

(*g*) Angle *v.* Insurance Company, 92 U. S. 330; Church *v.* Howard, 17 Hun, 5; Darwin *v.* Rippey, 63 N. C. 318; Bogarth *v.* Breedlove, 39 Tex. 561. Thus, adding to a note the words "in gold coin" is a material alteration. Wills *v.* Wilson, 3 Oregon 308.

(*h*) Whitesides *v.* Northern Bank, 10 Bush, 501.

(*i*) Weyerhauser *v.* Dun, 100 N. Y. 150. Addition of special agreement. In some States it has been held that the addition of the name of an attesting witness is a material alteration. Smith *v.* Dunham, 8 Pick. 246; Homer *v.* Wallis, 11 Mass. 310; Thornton *v.* Appleton, 29 Me. 298; Brackett *v.* Mountfort, 11 Me. 115. But in those States the attestation extends the liability of the maker under the statute of limitations, and so changes to some extent the nature of the contract and enlarges its obligations. In other States where such addition would not have this effect the alteration would not be material. Fuller *v.* Green, 64 Wis. 159.

ARTICLE X.

BILLS OF EXCHANGE; FORM AND INTERPRETATION.

Section 210. Bill of exchange defined.
211. Bill not an assignment of funds in hands of drawee.
212. Bill addressed to more than one drawee.
213. Inland and foreign bills of exchange.
214. When bill may be treated as promissory note.
215. Drawee in case of need.

§ 210. **Bill of exchange defined.**—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer (*a*).

(*a*) Jarvis v. Wilson, 46 Conn. 91.

§ 211. **Bill not an assignment of funds in hands of drawee.**—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same (*a*).

(*a*) Harris *v.* Clark, 3 N. Y. 93; Mandeville *v.* Welch, 5 Wheat. 286; Brill *v.* Tuttle, 81 N. Y. 454; Alger *v.* Scott, 54 N. Y. 14; Munger *v.* Shannon, 61 N. Y. 251; Commonwealth *v.* Am. Life Ins. Co. 167 Pa. St. 586; Reilly *v.* Daly, 159 Pa. St. 605; Bailey *v.* Southwestern R. R. Bank, 11 Fla. 266. But when, for a valuable consideration from the payee, the order is drawn upon a third party and made payable out of a particular fund, then due or to become due, from him to the drawer, the delivery of the order to

the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order and to no other purpose, and the payee may, by action, compel such application. Brill *v.* Tuttle, 81 N. Y. 454, 457. An intention to make an assignment of the funds in the hands of the drawee may be inferred from the circumstances attending the delivery of the draft and the conduct of the parties. Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83.

§ 212. **Bill addressed to more than one drawee.**— A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

§ 213. **Inland and foreign bills of exchange.**— An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill (*a*). Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

(*a*) Statute applied, Amsinck *v.* Rogers, 189 N. Y. 252. See also Commercial Bank of Kentucky *v.* Varnum, 49 N. Y. 269; Life Insurance Company *v.* Pendleton, 112 U. S. 696; Armstrong *v.* American Ex. National Bank, 133 U. S. 433; Buckner *v.* Finley, 2 Peters, 586; Joseph *v.* Solomon, 19 Fla. 623; Phœnix Bank *v.* Hussey, 12 Pick. 483; Thompson *v.* Commercial Bank, 3 Caldw. 49; Union Bank *v.* Fowlkes, 2 Sneed, 556.

§ 214. **When bill may be treated as promissory note.**— Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note (*a*).

(*a*) See section 36.

§ 215. **Referee in case of need.**—The drawer of a bill and any indorser may insert thereon* the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment (*a*). Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

(*a*) The usual form is: "In case of need, apply to Messrs. C and D, at E." Chitty on Bills, 165.

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* Error in engrossing. The word should be "therein."

ARTICLE XI.

Acceptance of Bills of Exchange.

Section 220. Acceptance, how made, et cetera.
221. Holder entitled to acceptance on face of bill.
222. Acceptance by separate instrument.
223. Promise to accept; when equivalent to acceptance.
224. Time allowed drawee to accept.
225. Liability of drawee retaining or destroying bill.
226. Acceptance of incomplete bill.
227. Kinds of acceptances.
228. What constitutes a general acceptance.
229. Qualified acceptance.
230. Rights of parties as to qualified acceptance.

§ 220. **Acceptance; how made, et cetera.**— The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer (*a*). The acceptance must be in writing and signed by the drawee (*b*). It must not express that the drawee will perform his promise by any other means than the payment of money.

(*a*) The acceptance is a response to the direction contained in the bill, and the language of the bill and the acceptance are but parts of one entire contract in writing. Meyer *v.* Beardsley, 29 N. J. Law, 236. But this contract is regarded as a new contract. Superior City *v.* Ripley, 138 U. S. 93. The usual mode of making an acceptance is by writing the word "accepted," and subscribing the drawee's name. Byles on Bills, 190. But the drawee's signature alone is sufficient. Spear *v.* Pratt, 2 Hill, 582; Wheeler *v.* Webster, 1 E. D. Smith.

(*b*) 1 Rev. Stat. N. Y. 768, section 6; Laws of Pa. 1881, 17. The English Bills of Exchange Act, following previous English statutes (1 and 2 George IV., C. 78; 19 and 20 Victoria, C. 78) requires that the acceptance be written on the bill. The American statutes do not generally require this; and such a requirement would sometimes work inconvenience. Thus, it has been held that a bank can accept a check by telegraph, and such an acceptance has been deemed to be within the terms of a statute requiring acceptances to be in writing, North Atchison Bank *v.* Garretson, 51 Fed Rep. 167; but to require the acceptance to be on the instrument itself would preclude the giving of an acceptance by telegraph either by a bank or by any other drawee. But under the statute the acceptance of a bank as well as that of any other payee must be in writing. Van Buskirk *v.* State Bank of Rocky Ford, 35 Colo. 142. At common law an oral acceptance was sufficient. Scudder *v.* Union Bank, 91 U. S 406; Hall *v.* Cordell, 142 U. S 116; Jones *v* Council Bluffs Branch, Etc. 34 Ill. 313; Sturges *v.* Chicago Fourth Nat. Bank, 75 Ill. 595; Ward *v.* Allen 2 Mete 53, Cook *v.* Baldwin, 120 Mass. 317. The introduction of this doctrine, however, was often regretted. In Clark *v.* Coch, 4 East. 72, Lawrence, J., said: "It would have been much better doctrine if it had been originally determined that nothing else should amount to an acceptance than a written acceptance on the bill itself." As the statute requires the acceptance to be in writing, the fact that it was so given must be pleaded. Wadhams *v.* Portland, Etc., Ry. Co., 37 Wash 86

§ 221. **Holder entitled to acceptance on face of bill.**— The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

1 Rev. Stat. N. Y., section 9.

§ 222. **Acceptance by separate instrument.**— Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

1 Rev. Stat. N. Y. 768, section 7.

§ 223. **Promise to accept; when equivalent to acceptance.** —An unconditional promise in writing (*a*) to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value (*b*).

(*a*) Statute applied, Bank of Morganton *v.* Hay, 143 N. C. 326. An absolute authority to draw is equivalent to an unconditional promise to pay the draft within the statute. Ruiz *v.* Renauld, 100 N. Y. 256; Merchants' Bank *v* Griswold, 72 N. Y. 472, 479; Barney *v.* Wortington, 37 N. Y. 112. The promise must be unconditional. Germania National Bank *v.* Tooke, 101 N Y. 442; Shover *v.* Western Union Telegraph Co., 57 N. Y. 459, 463. But restrictions as to the time or amount do not prevent the promise from being treated as unconditional and absolute as to drafts within the limitation. Bank of Michigan *v* Ely, 17 Wend. 508; Ulster Co. Bank *v.* McFarlan, 5 Hill, 432. It is also held that an authority given to an agent to draw "from time to time, as may be necessary in the purchase of lumber," or as "you want more funds," operates simply as an instruction to the agent, and does not, as to persons dealing with him in good faith, constitute a condition. Merchants' Bank *v.* Griswold, 72 N. Y. 472; Bank of Michigan *v* Ely, 17 Wend. 508. The party dealing with the agent may rest upon his representation, express or implied, that the draft is in the business of the principal, or that the funds are needed, and he is protected, although it turns out that the representation is false. N. Y & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30; Merchants' Bank *v.* Griswold, 72 N. Y. 472. The requirement that the promise shall be in writing is wholly statutory. At common law an oral promise was sufficient. Dull *v.* Bricker, 76 Pa. St. 255; Scudder *v.* Union Nat. Bank, 91 U. S 406; Williams *v.* Winans, 2 Gr. (N. J.) 239; Jarvis *v.* Wilson, 46 Conn. 91 A telegraphic authority is sufficient. Johnson *v.* Clark, 39 N. Y. 216; North Atchison Bank *v.* Garretson, 51 Fed. Rep. 167; Franklin Bank *v.* Lynch, 52 Md. 270. As to countermanding by telegraph an offer to accept, see First Nat. Bank *v.* Clark, 61 Md. 400. A promise to accept is governed by the law of the State where it is made, notwithstanding it is to be performed elsewhere. Scott *v.* Pilkington, 15 Abb. Pr. 280.

(*b*) 1 Rev. Stat. N. Y. 768, section 8; Brown *v.* Ambler, 66 Md.

391. But the holder must acquire the bill on the faith of the promise to accept. Howland *v.* Carson, 15 Pa. St. 453.

§ 224. **Time allowed drawee to accept.**— The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill (*a*); but the acceptance if given dates as of the day of presentation (*b*).

(*a*) See Byles on Bills, 182; Daniel on Neg. Inst., section 492. By the former statute of Massachusetts, the drawee had until two o'clock on the day following. (Public Statutes, 1882, Ch. 77, section 17.)

(*b*) There does not appear to be any direct authority on this point; the rule of the statute conforms to what was the common practice. See also statute of Massachusetts above referred to.

§ 225. **Liability of drawee retaining or destroying bill.**— Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same (*a*).

(*a*) This section was taken without change from a New York statute which had been in force for many years. 1 Rev. Stat. N. Y. 769, sec. 11. This statute had been construed by the Court of Appeals, which held that the *refusal* spoken of meant an affirmative act, and that a mere omission to return, where there was no demand, was not a "refusal" within the meaning of the statute. Matteson *v.* Moulton, 79 N. Y. 627. See also Westberg *v.* Chicago Lumber & Coal Co., 117 Wis. 589. And this seems to be the plain import of the language used. But the Supreme Court of Pennsylvania, in a late case, has held that mere neglect to return the paper may constitute such a refusal. Wisner *v.* First Nat. Bank, 68 Atl. Rep. 955. In this case, certain checks drawn upon the defendant were forwarded to it for collection, and the drawer not having sufficient funds on deposit to pay them, the defendant delivered them for protest to a notary public, who held them without protesting them, or giving notice of dishonor, and in this way the checks were retained for more

than two days after their delivery to the defendant:—*Held*, that such retention of the checks by the defendant was an acceptance within this section. But it is difficult to see how the statute could apply to such a state of facts. It refers only to cases where the paper is presented for *acceptance;* but where checks are remitted to the drawee bank, the obvious purpose is to present them for *payment*, and not mere *acceptance*. What the holder desires in such a case, is that the bank shall remit the money, not that it shall return the check with its acceptance placed thereon.

§ 226. **Acceptance of incomplete bill.**—A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

§ 227. **Kinds of acceptance.**—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn (*a*).

(*a*) Where a bill is addressed to the drawee in one place, and is accepted payable in another, this is a material variation. Walker *v.* Bank of State of N. Y., 13 Barb. 636; Niagara Bank *v.* Fairman Co., 31 Barb. 403. But a bill addressed generally to a drawee in a city may be accepted payable at a particular bank in that city. Troy City Bank *v.* Lanman, 19 N. Y. 477; Meyers *v.* Standart, 11 Ohio St. 29. And a bill so accepted is equivalent to a check. See section 147.

§ 228. **What constitutes a general acceptancy.***—An acceptance to pay at a particular place is a general accept-

* Error in engrossing.

ance unless it expressly states that the bill is to be paid there only and not elsewhere (*a*).

(*a*) Before the enactment of the 1 and 2 George IV., c. 78, it was a point much disputed whether, if a bill payable generally was accepted payable at a particular place, such an acceptance was a qualified one. Byles on Bills, 194. The House of Lords finally held that an acceptance payable at a particular place was a qualified acceptance, rendering it necessary, in an action against the acceptor, to aver and prove presentment at such place. Rome *v.* Young, 2 Brod. & Bing. 165; 2 Bligh, 391. This led to the passage of the statute above mentioned, called Sergeant Onslow's act, which provided that an acceptance payable at a particular place should be deemed a general acceptance unless expressed to be payable there "only and not otherwise or elsewhere." In the United States the weight of authority has been contrary to the decision of the House of Lords, and in favor of the rule as stated in this section. Wallace *v.* McConnell, 13 Peters, 136. See also note to section 130.

§ 229. **Qualified acceptance.**—An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated (*a*);

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

3. Local, that is to say, an acceptance to pay only at a particular place;

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all.

(*a*) Such an acceptance does not become due until the happening of the contingency upon which the bill is accepted. Brockway *v.* Allen, 17 Wend. 40; Newhall *v.* Clark, 3 Cush. 376; Myrick *v.* Merritt, 22 Fla. 335; Marshall *v.* Burnby, 25 Fla. 619.

§ 230. **Rights of parties as to qualified acceptance.**— The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance (*a*). Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

(*a*) Cline *v.* Miller, 8 Md. 274. But if he receives such an acceptance he can claim payment only according to the condition or qualification. (*Id.*) An agent for collection, as, for example, a bank, has no authority to receive anything short of an explicit and unqualified acceptance. Walker *v.* New York State Bank, 9 N. Y. 582.

ARTICLE XII.

Presentment of Bills of Exchange for Acceptance.

Section 240. When presentment for acceptance must be made.
241. When failure to present releases drawer and indorser.
242. Presentment; how made.
243. On what days presentment may be made.
244. Presentment; where time is insufficient.
245. When presentment is excused.
246. When dishonored by non-acceptance.
247. Duty of holder where bill not accepted.
248. Rights of holder where bill not accepted.

§ 240. When presentment for acceptance must be made. — Presentment for acceptance must be made:

1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument (*a*); or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

(*a*) Although when a bill is made payable at a day certain, as at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, yet where a bank receives such a bill for collection, its duty is to present the bill for acceptance without delay. For it is to the owner's interest that the bill should be so accepted, as

only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection. Allen *v.* Suydam, 17 Wend. 368. A bill payable at a fixed period from its date may be presented for acceptance at any time. Bachellor *v.* Priest, 12 Pick. 399; Oxford Bank *v.* Davis, 4 Cush. 188.

§ 241. **When failure to present releases drawer and indorser.**— Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time (*a*). If he fails to do so, the drawer and all indorsers are discharged.

(*a*) Robinson *v.* Ames, 20 Johns. 146; Gowan *v.* Jackson, 20 Johns. 176; Wallace *v.* Agry, 4 Mason, 333; Prescott Bank *v.* Coverly, 7 Gray, 217; Walsh *v.* Dort, 23 Wis. 334; Phœnix Ins. Co. *v.* Allen, 11 Mich. 30; Goupy *v.* Harden, 7 Taunt. 397. A delay of the mail is a sufficient excuse for the omission to immediately present a bill for acceptance; and a presentation immediately after its reception is in time to charge the indorser. Walsh *v.* Blatchley, 6 Wis. 422.

§ 242. **Presentment; how made.**— Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour (*a*), on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on* behalf (*b*); and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all (*c*), unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative (*d*);

* Through error in engrossing word "his" omitted.

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

(*a*) Cayuga County Bank *v.* Hunt, 2 Hill, 635.

(*b*) Byles on Bills, 182. The holder may require the production by the agent of a clear and explicit authority from his principal to accept in his name, and without its production may treat the bill as dishonored. Daniel on Negotiable Instruments, section 487.

(*c*) But if one of the drawees accepts he will be bound by his acceptance. Smith *v.* Melton, 133 Mass. 369.

(*d*) Presentment in such case is not necessary. See section 245. But as it will be convenient in most instances to have the bill duly protested, it is well to have some one designated to whom presentment can be made.

§ 243. **On what days presentment may be made.**— A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two and one hundred and forty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

§ 244. **Presentment where time is insufficient.**— Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 245. **Where presentment is excused.**— Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead (*a*), or has absconded, or is

a fictitious person or a person not having capacity to contract by bill;

2. Where after the exercise of reasonable diligence, presentment cannot be made (*b*);

3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

(*a*) Prior to the statute there was some doubt as to the proper course in this case. See Daniel on Negotiable Instruments, section 1178.

(*b*) As to what will constitute due diligence, see Sulsbacker *v.* Bank of Charleston, 86 Tenn. 201.

§ 246. **When dishonored by non-acceptance.**— A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused and the bill is not accepted.

§ 247. **Duty of holder where bill not accepted.**— Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 248. **Rights of holder where bill not accepted.**— When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary (*a*).

(*a*) Sterry *v.* Robinson, 1 Day (Conn.), 11.

ARTICLE XIII.

Protest of Bills of Exchange.

Section 260. In what cases protest necessary.
261. Protest; how made.
262. Protest; by whom made.
263. Protest; when to be made.
264. Protest; where made.
265. Protest both for non-acceptance and non-payment.
266. Protest before maturity where acceptor insolvent.
267. When protest dispensed with.
268. Protest; where bill is lost, et cetera.

§ 260. **In what cases protest necessary.**— Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged (*a*). Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary (*b*).

(*a*) Commercial Bank *v.* Varnum, 49 N. Y. 269, 275; Halliday *v.* McDougall, 20 Wend. 81; Demistoun *v* Stewart, 17 How. (U. S.) 606; Phœnix Bank *v.* Hussey, 12 Pick. 483. Protest is indispensable, and the proof cannot be supplied in any other way. Joseph *v.* Solomon, 19 Fla. 623. There are several reasons why protest is required in such cases: (1) for the sake of uniformity in international transactions; (2) because it affords satisfactory evidence of dishonor to the drawer, who, from his residence abroad, might experience a difficulty in making inquiries on the subject

and be compelled to rely on the representations of the holder; (3) because, as foreign courts give credit to the acts of a public functionary, the protest affords the most satisfactory evidence to charge an antecedent party. Byles, 256.

(*b*) See sections 189 and 213.

§ 261. **Protest; how made.**— The protest must be annexed to the bill, or must contain a copy thereof (*a*), and must be under the hand (*b*) and seal (*c*) of the notary making it, and must specify:

1. The time (*d*) and place (*e*) of presentment;

2. The fact that presentment was made and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found (*f*).

(*a*) Fulton *v.* MacCracken, 18 Md 528.

(*b*) The signature of the notary may be printed. Bank of Cooperstown *v.* Woods, 28 N. Y. 561; Fulton *v.* MacCracken, 18 Md 528.

(*c*) Donegan *v.* Wood, 49 Ala. 251 In other cases it has been held that the official signature is all that is required Huffuker *v.* National Bank, 12 Bush. 293. When the court can perceive that a seal is attached thereto the protest is sufficiently authenticated; neither the seal nor the signature of the notary need be proved. Barry *v.* Crowly, 4 Gill (Md.) 194.

(*d*) In the case of a note, the statement in a notarial certificate that it was presented on a certain day is not conclusive upon the parties, but evidence is admissible to show that presentment was also made on another day. Reynolds *v.* Appleman, 41 Md. 615.

(*e*) A certificate of a notary which states that he presented a note for payment at a certain town and demanded payment, which was refused, but did not state to whom or at what place in the town it was presented, does not show such a presentation to the maker as will bind the indorser. Duckert *v.* Von Lilienthal, 11 Wis. 56.

(*f*) The notarial certificate of protest is competent, without further proof. This has often been so held in respect to foreign bills.

Porter *v.* Judson, 1 Gray, 175; Pierce *v.* Indseth, 106 U. S. 546; Browne *v.* Philadelphia Bank, 6 S. & R. 484; Coruth *v.* Walker, 8 Wis. 252. For this purpose the different States of the Union are deemed foreign to each other, so that the notarial certificate of protest under seal is good on mere production. Townsley *v.* Sumrall, 2 Pet. 170; Halliday *v.* McDougall, 20 Wend. 81; Carter *v.* Burley, 9 N. H. 558, 566; Johnson *v.* Brown, 154 Mass. 105, 106. The statement in the certificate that notice of dishonor has been given is also received as evidence. Barry *v.* Crowly, 4 Gill (Md.) 194; Rosson *v.* Carroll, 90 Tenn. 90; Legg *v.* Vinal, 165 Mass, 555. But the notary's certificate is not evidence of other collateral or independent facts it may contain, especially when such facts are not necessarily within the personal knowledge of the notary, or are of such a character as could not be established by his testimony if he were produced as a witness. Weems *v.* Farmers' Bank, 15 Md. 231. Thus, the statement that the party on whom the demand was made was "one of the administrators" of the acceptor, does not establish the facts of the death of the acceptor, and of the granting of letters of administration on his estate to such party. (*Id.*) So the words "after diligent search and inquiry to ascertain his whereabouts" are not admissible as evidence of such "diligent search and inquiry" having been made; for this is a conclusion of law which the notary could not legally draw or establish by his own testimony. Reier *v.* Strauss, 54 Md. 278. See also Ricketts *v.* Pendleton, 14 Md. 320; Duckert *v.* Von Lilienthal, 11 Wis. 56; Sumner *v.* Bowen, 2 Wis. 524; Adams *v.* Wright, 14 Wis. 408. A notarial certificate of protest is evidence of the facts therein set forth, although the notary, when examined, has no recollection of them. Rosson *v.* Carroll, 90 Tenn. 90; Sherer *v.* Easton Bank, 33 Pa. St. 134. And the entries of a deceased notary in his register are admissible. Spann *v.* Baltzell, 1 Fla. 301; Porter *v.* Judson, 1 Gray, 175. When a notary has neglected to keep a record of the notice which he has served on the non-payment of a note, his oral testimony is admissible to prove its contents. Terbell *v.* Jones, 15 Wis. 253. Where the protest is exclusively relied upon to prove the necessary facts to fix liability upon the parties to be affected, it must contain sufficient averments to show that everything requisite has been done on the part of the holder, or his agent, to authorize the demand upon the indorser. People's Bank *v.* Brooke, 34 Md. 7. For a case where the protest was insufficient see Mason *v.* Kilcourse, 71 N. J. Law, 472, 473–474.

§ 262. **Protest; by whom made.**— Protest may be made by:

1. A notary public (*a*); or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses (*b*).

(*a*) It would seem that, in the absence of any custom or usage on the subject, the presentment and demand must be made by the notary in person. Commercial Bank *v.* Varnum, 49 N. Y. 269, 275; Ocean Nat. Bank *v.* Williams, 102 Mass. 141. A notary who is an officer of a bank may legally protest paper belonging to the bank. Nelson *v.* First National Bank, 69 Fed. Rep. 798; 29 U. S. App. 554. And though he is also a stockholder in the bank. Moreland's Assignee *v.* Citizens' Savings Bank, 97 Ky. 211. And it has been held that the cashier of a bank who is a notary may legally protest his own note which has been discounted by the bank. Dykman *v.* Northridge, 1 App. Div. (N. Y.) 26.

(*b*) Todd *v.* Neal's Administrator, 49 Ala. 273.

§ 263. **Protest; when to be made.**— When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting (*a*).

(*a*) The protest should be commenced, at least (and such an incipient protest is called noting), on the day on which acceptance or payment is refused; but it may be drawn up and completed at any time before the commencement of the suit, or even before or during the trial, and ante-dated accordingly. Byles on Bills, 257.

§ 264. **Protest; where made.**— A bill must be protested at the place where it is dishonored (*a*), except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the

place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary (*b*).

(*a*) See Daniel on Neg. Inst., section 935; Byles on Bills, 257.
(*b*) 3 William IV. Ch. 98; Daniel on Neg. Inst., section 935; Byles on Bills, 258.

§ 265. **Protest both for non-acceptance and non-payment.** —A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 266. **Protest before maturity where acceptor insolvent.** —Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

§ 267. **When protest dispensed with.**—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

§ 268. **Protest where bill is lost, et ectera.**— Where a bill is lost or destroyed or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof (*a*).

(*a*) Hinsdale *v.* Miles, 5 Conn. 331. Loss of the instrument does not excuse demand and protest. Daniel on Negotiable Instruments, section 1464. See also section 245.

ARTICLE XIV.

Acceptance of Bills of Exchange for Honor.

Section 280. When bill may be accepted for honor.
281. Acceptance for honor; how made.
282. When deemed to be an acceptance for honor of the drawer.
283. Liability of acceptor for honor.
284. Agreement of acceptor for honor.
285. Maturity of bill payable after sight; accepted for honor.
286. Protest of bill accepted for honor, et cetera.
287. Presentment for payment to acceptor for honor; how made.
288. When delay in making presentment is excused.
289. Dishonor of bill by acceptor for honor.

§ 280. When bill may be accepted for honor.— Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party (*a*).

(*a*) Byles on Bills, 262-266.

§ 281. **Acceptance for honor; how made.**— An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ 282. **When deemed to be an acceptance for honor of the drawer.**— Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 283. **Liability of acceptor for honor.**— The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted (*a*).

(*a*) The acceptor for the honor of the drawer cannot maintain an action thereon against him without proof of its presentment to the drawee and non-acceptance or non-payment by him, and notice thereof to the drawer. Baring *v.* Clark, 19 Pick. 220.

§ 284. **Agreement of acceptor for honor.**— The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§ 285. **Maturity of bill payable after sight; accepted for honor.**— Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 286. **Protest of bill accepted for honor, et cetera.**— Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be

protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ 287. **Presentment for payment to acceptor for honor; how made.**— Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five (*a*).

(*a*) Doubts having arisen as to the day when the bill should be again presented to the acceptor for honor, or referee in case of need, for payment, the 6 and 7 Will. 4, c. 58, enacted that it should not be necessary to present, or in case the acceptor for honor or referee live at a distance, to forward for presentment, till the day following that on which the bill becomes due. Byles on Bills, 263.

§ 288. **When delay in making presentment is excused.**— The provisions of section one hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ 289. **Dishonor of bill by acceptor for honor.**— When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE XV.

Payment of Bills of Exchange for Honor.

Section 300. Who may make payment for honor.
301. Payment for honor; how made.
302. Declaration before payment for honor.
303. Preference of parties offering to pay for honor.
304. Effect on subsequent parties where bill is paid for honor.
305. Where holder refuses to receive payment supra protest.
306. Rights of payer for honor.

§ 300. **Who may make payment for honor.**— Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn (*a*).

(*a*) Byles on Bills, 267–269; Daniel on Neg. Inst., section 1254.

§ 301. **Payment for honor; how made.**— The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it (*a*).

(*a*) Byles on Bills, 267; Daniel on Neg. Inst., section 1258. A stranger to the drawer and indorser of a non-accepted bill may intervene supra protest to pay the same for the honor of the indorser or drawer. Konig *v.* Bayard, 1 Pet. 250. And it is no objection to this intervention that it has been done at the request and under the guarantee of the drawer who had refused acceptance or payment. (*Id.*)

§ 302. **Declaration before payment for honor.**— The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 303. **Preference of parties offering to pay for honor.**— Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 304. **Effect on subsequent parties where bill is paid for honor.**— Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter (*a*).

(*a*) Daniel on Neg. Inst., section 1255.

§ 305. **Where holder refuses to receive payment supra protest.**— Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 306. **Rights of payer for honor.**— The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE XVI.

BILLS IN A SET.

Section 310. Bills in sets constitute one bill.
311. Rights of holders where different parts are negotiated.
312. Liability of holder who indorses two or more parts of a set to different persons.
313. Acceptance of bills drawn in sets.
314. Payment by acceptor of bills drawn in sets.
315. Effect of discharging one of a set.

§ 310. Bills in sets constitute one bill.— Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill (*a*).

(*a*) Byles on Bills, 387; Daniel on Neg. Inst., section 113; Durkin *v.* Cranston, 7 Johns. 442.

§ 311. Rights of holders where different parts are negotiated.— Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill (*a*). But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

(*a*) Byles on Bills, 389; Walsh *v.* Blatchley, 6 Wis. 422.

§ 312. Liability of holder who indorses two or more parts of a set to different persons.— Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him

is liable on the part he has himself indorsed, as if such parts were separate bills (*a*).

(*a*) Holdsworth *v.* Hunter, 10 C. B. 449; Byles on Bills, 389.

§ 313. **Acceptance of bills drawn in sets.**— The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill (*a*).

(*a*) Holdsworth *v.* Hunter, 10 C. B. 449; Byles on Bills, 389. Either of the set may be presented for acceptance, and if not accepted a right of action arises, upon due notice, against the indorser. Dounes & Co. *v.* Church, 13 Peters, 205; Walsh *v.* Blatchley, 6 Wis. 422, 425.

§ 314. **Payment by acceptor of bills in drawn sets.**— When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon (*a*).

(*a*) Byles on Bills, 389.

§ 315. **Effect of discharging one of a set.**— Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged (*a*).

(*a*) Byles on Bills, 388.

ARTICLE XVII.

Promissory Notes and Checks.

Section 320. Promissory note defined.
321. Check defined.
322. Within what time a check must be presented.
323. Certification of check; effect of.
324. Effect where holder of check procures it to be certified.
325. When check operates as an assignment.

§ 320. **Promissory note defined.**—A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer (*a*). Where a note is drawn to the maker's own order, it is not complete until indorsed by him (*b*).

(*a*) This section makes a change in the law of New York as regards the presumption of consideration in the case of non-negotiable notes. The terms of the former New York statute included a note payable to a person named therein without words of negotiability. Carnwright *v.* Gray, 127 N. Y. 92. But as that statute has been repealed, and as the provisions of the Negotiable Instruments Law apply only to negotiable promissory notes, it is now necessary to prove consideration in actions upon non-negotiable notes. Deyo *v.* Thompson, 53 App. Div. (N. Y.) 12. The rules on the subject have differed in the different States. See Daniel on Negotiable Instruments, section 163. In Connecticut the act has made no change in the law; for the rule in that State has been that a non-negotiable note does not import a consideration. Bristol *v.* Warner, 19 Conn. 17. A certificate of deposit issued by a banker in the ordinary form of such instruments is, in substance and legal effect, a negotiable promissory note. Cur-

ran *v.* Witter, 68 Wis. 16; Maxwell *v.* Agnew, 21 Fla. 154. And so are coupons payable to bearer. Trustees of the I. I. Fund *v.* Lewis, 34 Fla. 424. In an action on a note payable absolutely, evidence is not admissible to prove an oral agreement that the maker of the note was not to pay it unless he received the amount of the note from another person. Torpey *v.* Tebo, 184 Mass. 307.

(*b*) Statute applied, Sherman *v.* Goodwin (Ariz.), 89 Pac. Rep. 517; Geo. Alexander & Co. *v.* Hazelrigg (Ky.), 97 S. W. Rep. 353. Under the statute a maker indorsing the note incurs a separate and distinct liability as indorser, and may be sued as such. National Exchange Bank *v.* Lubrano (R. I.), 68 Atl. Rep. 944. Under the former statute in New York the indorsement of the maker was not necessary. Irving National Bank *v.* Alley, 79 N. Y. 536.

§ 321. **Check defined.**—A check is a bill of exchange drawn on a bank (*a*), payable on demand (*b*). Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check (*c*).

(*a*) Statute applied, Wedge Mines Co. *v.* Denver Nat. Bank, 19 Colo. App. 182; Boswell *v.* Citizens' Savings Bank (Ky.), 96 S. W. Rep. 797. One of the characteristics which distinguish a check from a bill of exchange is that a check is always drawn on a bank or banker. Harris *v.* Clark, 3 N. Y. 93, 115; In the matter of Brown, 2 Story's Rep. 502. See also Bull *v.* Bank of Kasson, 123 U. S. 105; Rogers *v.* Durant, 140 U. S. 298; Espy *v.* Bank of Cincinnati, 18 Wall. 620; Merchants' Bank *v.* State Bank, 10 Wall. 604; Chapman *v.* White, 6 N. Y. 412; Harker *v.* Anderson, 21 Wend. 373; Murray *v.* Judah, 6 Cow. 484; Cruger *v.* Armstrong, 3 Johns. 5; Ridgeley Bank *v.* Patton, 109 Ill. 484; Harrison *v.* Nicollet Nat. Bank, 41 Minn. 489; Northwestern Coal Co. *v.* Bowman, 69 Iowa, 152; Planters' Bank *v.* Keese, 7 Heisk. 200; Blair *v.* Wilson, 28 Gratt. 170; Dodd *v.* Jette, 10 Oregon 31; Hopkinson *v.* Forster, L. R. 18 Eq. 74. Under the statute cashier's checks, whether certified or otherwise, are classed with bills of exchange payable on demand. Singer Mfg. Co. *v.* Summers, 143 N. C. 103.

(*b*) There has been some conflict in the decisions as to whether a draft upon a bank not payable immediately was a check or bill

of exchange. The latter view was adopted in New York. Bowen *v.* Newell, 8 N. Y. 190; 13 N. Y. 390. To the same effect also are the following cases: Ivory *v.* Bank of the State, 36 Mo. 475; Harrison *v.* Nicollet National Bank, 41 Minn. 488; Georgia National Bank *v.* Henderson, 46 Ga. 496; Minturn *v.* Fisher, 4 Cal. 36; Morrison *v.* Bailey, 5 Ohio St. 13. *Contra:* Champion *v.* Gordon, 70 Pa. St. 474; Westminster Bank *v.* Wheaton, 4 R. I. 30, *In re* Brown, 2 Story, 502. In all of these cases the particular question presented was whether the instrument was entitled to grace. But now that grace has been abolished the distinction is of little, if any, practical importance.

(*c*) Bill *v.* Stewart, 156 Mass. 508; Ames *v.* Meriam, 98 Mass. 294. Presentment and notice of dishonor are necessary in order that the holder may recover of the drawer. Herker *v.* Anderson, 21 Wend. 372; Dolph *v.* Rice, 18 Wis. 397. But unless the check answers the description of a foreign bill protest is not required. Wittich *v.* First Nat. Bank of Pensacola, 20 Fla. 843. See section 189.

§ 322. Within what time a check must be presented.—A check must be presented for payment within a reasonable time after its issue or the drawer (*a*) will be discharged from liability thereon to the extent of the loss caused by the delay (*b*).

(*a*) It will be noted that this section applies only to the drawer. The rights of indorsers are governed by section 131. See note to that section. But, of course, where the drawer is discharged under section 322, the indorser, being a subsequent party, will be discharged under the provision of section 201, "that a person secondarily liable is discharged * * * by the discharge of a prior party."

(*b*) For cases applying the statute, see Gordon *v.* Levine, 194 Mass. 418, 421; Aebi *v.* Bank of Evansville, 124 Wis. 73, 77; Citizens' Bank v. First Nat. Bank (Iowa), 113 N. W. Rep. 481; Cox *v.* Citizen's State Bank, 73 Kans. 789; Moskowitz *v.* Deutsch (N. Y.), 46 Misc. 603; Singer Manufacturing Co. *v.* Summers, 143 N. C. 103. The holder's laches in presenting a check for payment constitutes no defense in an action against the drawer unless he is damaged by the delay, and then only to the extent of his loss.

A check purports to be made upon a deposit to meet it, and presupposes funds of the drawer in the hands of the drawee. But if the drawer has no such funds at the time of drawing his check, or subsequently withdraws them, he commits a fraud upon the payee, and can suffer no loss or damage from the holder's delay in respect to presentment or notice. In such case he is liable and cannot insist upon a formal demand or notice of non-payment. First National Bank of Portland *v.* Linn County National Bank, 30 Oregon 296; Industrial Bank of Chicago *v.* Bowes, 165 Ill. 70. For instances of unreasonable delay see Industrial Trust, Title and Savings Co. *v.* Weakley, 103 Ala. 458; Gifford *v.* Hardell, 88 Wis. 538; First National Bank of Wymore *v.* Miller, 43 Neb. 791; Comer *v.* Dufour, 95 Ga. 376; Grange *v.* Reigh, 93 Wis. 552; Western Wheeled Scraper Co. *v.* Sadilek, 50 Neb. 105; Gregg *v.* Beane, 69 Vt. 22; Holmes *v.* Roe, 62 Mich. 199. For instances of presentment in due time, see Loux *v.* Fox, 171 Pa. St. 68; Willis *v.* Finley, 173 Pa. St. 28; First Nat. Bank *v.* Buckhannon Bank, 80 Md. 475; Lloyd *v.* Osborne, 92 Wis. 93; Bell *v.* Alexander, 21 Gratt. 1; Purcell *v.* Ellemong, 22 Gratt. 739. But while as between the holder and drawer of a check, presentment may be made at any time, and delay in presentment does not discharge the drawer, unless loss has resulted to him, a different rule obtains as between holder and indorser. The holder, on accepting the check, assumes the obligation to present the same for payment within the time prescribed by law, and if payment is refused to give notice of non-payment. A failure to do this discharges the indorser from liability as such irrespective of any question of loss or injury. Carroll *v.* Swift, 128 N. Y. 19. It is not clear whether the death of the drawer revokes the authority of the bank to pay a check. There is no decision directly in point, and the view of the text writers differ. To meet the difficulty, the original draft of the Negotiable Instruments Law submitted to the commissioners contained a provision (which was taken from the statute of Massachusetts) as follows: "The death of the drawer does not operate as a revocation of the authority to pay a check, if the check is presented for payment within ten days from the date thereof." But it was thought by the conference of commissioners that this would be objected to in some of the States because of the effect it might have on the estates of decedents.

§ 323. Certification of check; effect of.— Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance (*a*).

(*a*) See Merchants' Bank *v.* State Bank, 10 Wall. 604; Cooke *v.* State Nat. Bank, 52 N. Y. 96; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y. 125. Section 270 applies to an acceptance by a bank as well as by any other drawee, and hence it must be in writing; and an action cannot be maintained against the bank on an oral promise to pay. Van Buskirk *v.* State Bank, 35 Colo. 142, 145. The certification does not admit the genuineness of the indorser's signature. First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296. As to the liabilities incurred, see section 112. Where a check delivered without the indorsement of the payee is afterwards certified by the bank, the holder may recover of the bank, though he is unable to obtain the indorsement of the payee. Meuer *v.* Phenix Nat. Bank, 94 App. Div. (N. Y.) 331.

§ 324. Effect where the holder of check procures it to be certified.— Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon (*a*).

(*a*) See Minot *v.* Russ, 156 Mass. 458; Metropolitan Bank *v.* Jones, 137 Ill. 634; Meridian Nat. Bank *v.* First Nat. Bank, 7 Ind. App. 322; First Nat. Bank *v.* Leach, 52 N. Y. 350. The bank, for its own protection, usually charges up the check, when certified, to its depositor; and, as the drawer cannot thereafter draw against the same fund, it would be unjust that the money should be left in the bank at his risk and he remain liable upon the extended check. Bank *v.* Carter, 88 Tenn. 279. But where the check is certified when delivered it does not constitute payment any more than an uncertified check; and if it is presented promptly and dishonored, the loss must fall upon the drawer. Born *v.* First Nat. Bank, 123 Ind. 78; Cincinnati Oyster & Fish Co. *v.* Nat. Lafayette Bank, 51 Ohio St. 106; Bank *v.* Carter, *supra*. If the certification is made at the request of the indorsee, it operates to release the indorser, though made in the absence of funds belonging to the drawer. First Nat. Bank *v.* Currie, 147 Mich. 72.

§ 325. **When check operates as an assignment.***—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check (*a*).

(*a*) Statute applied in Baltimore & Ohio R. R. Co. *v.* First Nat. Bank, 102 Va. 753; Van Buskirk *v.* State Bank, 35 Colo. 148; Tibby Bros. Glass Co. *v.* Farmers & Mechanics' Bank, (Pa.) 69 Atl. Rep. 280. Prior to the statute there was considerable conflict in the authorities. The rule adopted in the act is supported by the weight of authority. See Bank *v.* Millard, 10 Wall. 152; Bank *v.* Schuyler, 120 U. S. 511; Florence Mills Co. *v.* Brown, 124 U. S. 385; First Nat. Bank *v.* Whitman, 94 U. S. 343, 344; St. L. & S. F. Ry. Co. *v.* Johnston, 133 U. S. 566; Attorney-General *v.* Continental Life Insurance Co., 71 N. Y. 325, 330; First Nat. Bank of Union Mills *v.* Clark, 134 N. Y. 368; O'Connor *v.* Mechanics' Bank, 124 N. Y. 324; Maginn *v.* Dollar Savings Bank, 131 Pa. St. 362; Saylor *v.* Bushong, 100 Pa. St. 27; Covert *v.* Rhodes, 48 Ohio St. 66; Cincinnati H. & D. R. R. Co. *v.* Metropolitan Nat. Bank, 54 Ohio St. 60; Pickle *v.* People's Nat. Bank, 88 Tenn. 380; Boetcher *v.* Colorado Nat. Bank, 15 Col. 16; Hopkinson *v.* Foster, L. R., 18 Eq. 74. *Contra*, Fonner *v.* Smith, 31 Neb. 107; Munn *v.* Burch, 25 Ill. 35; Bank *v.* Patton, 109 Ill. 479, 485; Doty *v.* Caldwell, 38 S. W. Rep. 1025; Nat. Bank of America *v.* Nat. Bank of Ill., 164 Ill. 503. But while the mere making and delivery of a check in the ordinary course of business does not operate as an assignment of the fund, it is yet competent for the parties to create such an assignment by a clear agreement or understanding, oral or otherwise, in addition to the giving of the check that such shall be the effect of the transaction. Fourth Street National Bank *v.* Yardley, 165 U. S. 634; Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 88.

§ 326. **Recovery of forged check.**— No bank shall be liable to a depositor for the payment by it of a forged or

*The section-head is inaccurate, since the section expressly declares that a check is *not* an assignment. The reading should be, "*Check not an assignment — When bank liable.*"

raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised (*a*).

(*a*) This section was added by Laws of New York, 1904, ch. 287. It does not seem to be germane to the Negotiable Instruments Law, and would more properly have been enacted as an amendment to the Banking Law. If the statute is to be amended by adding provisions outside of its proper scope, it will soon become such a piece of patchwork, that there will be a demand for its repeal.

ARTICLE XVIII.*

Notes Given for a Patent Rights and for a Speculative Consideration.

Section 330. Negotiable instruments given for patent rights.
331. Negotiable instruments given for a speculative consideration.
332. How negotiable bonds are made non-negotiable.

§ 330. Negotiable instruments given for patent rights.—A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article (*a*).

(*a*) Laws N. Y. 1877, ch. 65, section 1; Laws of Pa. 1872, 60. This section is not in contravention of the Constitution of the United States and the Acts of Congress which secure to a patentee for a limited time "the full and exclusive right and liberty of making, using and vending to others to be used" his invention or discovery. Herdie *v.* Roessler, 109 N. Y. 127; Tod *v.* Wick, 36 Ohio St. 370; Haskell *v.* Jones, 86 Pa. St. 173; Shires *v.* Commonwealth, 120 Pa. St. 368; Breckhill *v.* Randall, 102 Ind. 528;

* This article appears only in the New York and Ohio acts.

New *v.* Walker, 108 Ind. 365. If the note does not contain the statement required by this section it is unenforcible between the parties; but, if negotiable paper, it is valid in the hands of a holder in due course. New *v.* Walker, 108 Ind. 365; Kniss *v.* Holbrook, 16 Ind. App. 229; Harmon *v.* Hagerty, 88 Tenn. 705.

§ 331. **Negotiable instrument for a speculative consideration.**— If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder (*a*).

(*a*) Laws N. Y. 1874, ch. 262, section 1. It has become quite the custom for the States to pass laws requiring notes given in various transactions to disclose the nature of the consideration, and one State legislature has gone so far as to require that this part of the contract shall be written in *red ink*. In construing one of these statutes, the Supreme Court of Wisconsin, in a late case, has said: "The sales of lightning rods, patent rights, and stallions, were evidently considered by the Legislature as transactions, presenting quite similar opportunities and inducements for overreaching by fraudulent methods, and so it was determined that they might well be controlled by the same restrictive provisions; but there is absolutely no indication either in the law itself

or in the nature of things that the restriction upon the free sale of stallions or lightning rods was considered in any way dependent upon or compensated by the restriction upon the sale of patent rights. It is not claimed that such a restriction upon the freedom of sales of stallions is unreasonable or unwarranted. The records of this court in recent years seem to show that such transactions present peculiarly seductive opportunities for misrepresentation and fraud even surpassing those presented by the traditional horse trade." Quiggle *v.* Herman, 131 Wis. 379. For other cases construing similar statutes, see note to section 96.

§ 332. **How negotiable bonds are made non-negotiable.**—The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence (*a*).

(*a*) Laws N. Y. 1871, ch. 81; Laws N. Y. 1873, ch. 595.

ARTICLE XIX.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 340. Laws repealed.
341. When to take effect.

§ 340. Laws repealed.— The laws or parts thereof specified in the schedule hereto annexed are hereby repealed.

§ 341. When to take effect.—This chapter shall take effect on the first day of October, eighteen hundred and ninety-seven (*a*).

(*a*) See note to section 6.

SCHEDULE OF LAWS REPEALED.*

Revised Statutes.	Sections.	Subject Matter.
R. S., pt. II., ch. 4, tit. II.....	All....	Bills and notes.

Laws of	Chapter.	Section.	Subject Matter.
1835...	141...	All...	Notice of protest; how given.
1857...	416...	All...	Commercial paper.
1865...	309...	All...	Protest of foreign bills, etc.
1870...	438...	All...	Negotiability of corporate bonds; how limited.
1871...	84...	All...	Negotiable bonds; how made non-negotiable.
1873...	595...	All...	Negotiable bonds; how made negotiable.
1877...	65...	1,3...	Negotiable instruments given for patent rights.

* This schedule comprises only the New York statutes.

Laws of	Chapter.	Section.	Subject Matter.
1887...	461...	All...	Effect of holidays upon payment of commercial paper.
1888...	229...	All...	One hundredth anniversary of the inauguration of George Washington.
1891...	262...	1...	Negotiable instruments given for a speculative consideration.
1894...	607...	All...	Days of grace abolished.

LAWS OF NEW YORK, 1897, CHAPTER 613.

AN ACT to amend the Penal Code, relative to violation of the Negotiable Instruments Law.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The penal code is hereby amended by inserting at the end of title twelve the following new sections:

§ 384-m. **Notes given for patent rights.**— A person who takes, sells or transfers a promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part of the right to make, use or sell any patent invention or inventions, or any invention claimed or represented to be patented, without having the words "given for a patent right" written or printed legibly and prominently on the face of such note or instrument above the signature thereto, is guilty of a misdemeanor.

§ 384-n. **Notes given for a speculative consideration.**— A person who takes, sells or transfers a promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part of the purchase price of any farm product at a price greater by four or more times than the fair market value of the same product at the time in the locality, or in which the consideration shall be in whole or in part membership of and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at such rate, without having the words "given for a speculative consideration," or other words clearly showing the nature of the consideration prominently and legibly written

or printed on the face of such note or instrument above the signature thereof is guilty of a misdemeanor.

§ 2. Section two of chapter sixty-five of the laws of eighteen hundred and seventy-seven, and section two of chapter two hundred and sixty-two of the laws of eighteen hundred and ninety-one, are hereby repealed.

§ 3. This act shall take effect the first day of October, eighteen hundred and ninety-seven.

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in case of instrument indorsed "for collection" 89, 90,

"WITHOUT RECOURSE," effect of term, 53.
WRITING may be in pencil, 8.
WRITTEN, what included in term, 4.
WRITTEN PROVISIONS prevail over printed, 29.

MARTHA BENSLEY BRUÈRE

I

Lawyers needed! Weren't the trolley cars running over superfluous lawyers every day? Didn't hurrying shysters fairly crowd one off the sidewalks? Was there a single business block without the sign "Notary Public and Counsellor at Law"? Why, there are twenty-story buildings down near Wall Street as full of lawyers as a warren is of rabbits. More lawyers! I put these things in elegant English; but she pushed them aside.

"I know all that," she said; "but they aren't in our field at all. We've a new sort of legal work to do: not to straighten out tangles after they are made, but to prevent things getting into a mess."

"But why do you think that is a woman's province?"

"Because to make things run smooth is a domestic problem. We've been trained to it for generations, and now that there isn't enough housekeeping in the world to keep us all busy some of us can turn our domestic instincts loose on law. Oh, I wish you'd come in and help!"

"But I don't think I have a legal mind," I objected.

"You don't need one," she cried.

And then she went on to explain that woman's inherited instincts were better law than any that the schools could teach her, because they sprang from ages of experience of what was best for the race, and though of course they weren't infallible they were as nearly so as anything we had. "What we need," she concluded, "is domestic minded lawyers."

She got me persuaded to the extent of reading a book by a certain Williston about some things called "torts," and incidentally brought me in contact with a group of women who were not trying to play man's legal game, but had put on a new game of their own in the old established courts.

I FIRST saw this new game in process when one day, as we were drinking tea in the firelight, Mrs. Mary Grace Quackenbos, whom we used to call the Lady Lawyer, rushed in and demanded:

"Will somebody lend me a cloak and hat?"

"What for?" asked a Literary Light, who, having just broken into our Best Magazines, had the nerve to ask questions.

"Because I'm going to the Alabama turpentine camps tonight, and this little black bonnet and cloak that I always wear might give me away. I want something bright and different, something to make me look less like a deaconess."

"Oh, detective work!" I cried. "Who's sending you?"

"Nobody's sending me. Some queer cases have turned up, and some very strange stories about the camps down there. I can't get the facts from this distance; so I've got to go."

"How about your practice?" gasped a young lawyer who had just been taken in on probation by a Wall Street firm. For him Law had an awful dignity. He always spoke of it in capitals. The star to which his wagon was hitched was a practice of his own, and it shocked him to hear Mrs. Quackenbos say lightly:

"Oh, anybody who can draw a brief can take care of the cases I'm leaving; but this Alabama business is different. Men have been coming into my office with welts and whip cuts on their backs. They say they have been held as slaves in the labor camps, chained and beaten and robbed. If it's true that hundreds of men are being held in peonage down there, the local federal attorney has got to know about it; by force, if necessary. Nothing can be done up here. And then it's just possible that there isn't a law to fit their particular case, anyway. If that's so, I need the facts to get a law from Congress that will."

"Now, isn't that just like a woman?" howled the Cub

vise of the United States Consulate of the district in which that municipality is situated.

Now isn't Mrs. Quackenbos right in insisting that all the world's a neighborhood? Isn't it time we took the bandage off the eyes of international Justice, induced her to lay down her sword, get her mind off the thief and the jail, and become a kindly, intelligent mother?

I suppose it isn't quite fair in speaking of this new place which women are making for themselves in law to ignore the fact that the regular ranks of law are pretty crowded. The graduates of law schools fairly boil over the top of the community caldron. They are like too many carrots in a row,—they crowd and crush one another, and nobody grows very big. But the women who transplant themselves into new fields grow like

who was formulating a law to control the night messenger service.

"But how can you call her a good lawyer?" he cried. "She doesn't know any law. And what she proposes will interfere with business."

"Perhaps so," we answered; "but she knows what the law ought to be."

That's the whole aim of the woman in law: to show that "Law Makes Right" is a fallacy. Take the work Mrs. Florence Kelley is doing, for instance. She walks straight up to the Law and says:

"See here! You mean well, I suppose; but you've been dealing with inanimate things like property and precedents and contracts so long that you have gradually lost sight of human nature. Allow me to call your attention to a few little matters that

ot the State are heard in a roomful of curious spectators; they are lifted

would hurt him, and I told him how I felt.

This letter is all about Harry and me; but you will understand how I feel. Do you know, I waltzed around the room by myself after Harry had gone to bed? Our dancing days were good, Edie; but having for a little boy who loves you is better, Dear. "The only son of his mother, and she a widow!" I feel rich, and I jingle my wealth—a doctor's fee!

Your affectionate friend, ELSA MARCHANT.

him and kissed her, "and I have learned to love the prettiest little uncaged bird —"

The splitting crack of a rifle ended his sentence, and a blue hole appeared in the center of his forehead. With awful suddenness the smile in his eyes changed to a petrified glare.

EVERY man leaped to his feet with a roar of astonishment and rage.

Marillac uttered an agonized cry and caught the falling body of his master in his arms. At the same instant, with a shout of "Traitor!" a dragoon drove his sword through the professor's lungs, and he slid down upon the body of the Commandant

failure to keep [illegible] an appointment [illegible] ing bridge by a train [illegible] for the present [illegible] ton, author of "The [illegible]

Some years ago [illegible] William Gilbert, [illegible] wealthy but ignorant [illegible] man. She asked Mr. Gilbert several questions about musical composers, to show that she knew all about them.

"And what about Bach?" she asked. "Is he composing nowadays?"

"No, Madam," answered Gilbert; "he is decomposing."

ONE evening at dinner a prosperous elderly lawyer stirred fatly in his chair when he heard some of us praising a woman

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turpentine camps with a swirl of her bright bor-
owed cloak was still clear in my mind when she flut-
red down beside my teetable three years later. The
iterary Light, who had first gone South with her in
earch of copy, but had later followed half over the
orld through sheer affection, came with her.
I knew, as all the world does, that she had laid facts
fore the President which had led to her appointment
special assistant to the United States Attorney Gen-
al, that she had got the head of a great lumber and
rpentine company committed for peonage, and that
e had appeared before Congress with a plan for the
otection of the immigrant and of the people of Amer-
against immigration frauds. But the really great

I brought the Lady Lawyer a blue silk coat and a
gorgeous flower trimmed hat in which she looked—well,
not like a deaconess. And before the lawyer's appren-
ice had done with his amazement she slammed the cab
loor, and with a laugh and wave of her hand was gone.
within her country's gates were her concern; to treat
he whole United States as though it was just a house-
old, and she a careful housewife dispensing domestic
ustice!

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indignities of the criminal courtroom. What women lawyers are trying to do is to get the child's case away from prying eyes; to make him responsible to a probationary officer, a definite person whom he can see and touch instead of a vague, remote, intangible law that he can no more understand than he can the theory of permutations.

"Madam," replied the Law, "the fourteenth amendment says—"

And Mrs. Kelley indignantly departed. Then she and Miss Goldmark and their various assistants began to amass such evidence as would convince—not a man, that was simple enough; but a Judge, which is quite a different matter. They had to scour the records of all Europe to discover evidence that could be grasped by the judicial mind. But they got it: for in 1910 when another law limiting the hours of women's work

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Hays v. Hathborn et al
74 N. Y. 486 - 1878.

Action on a promissory note.
Appeal from judgment for P.

Facts: Note made by Hathborn and Southgate to the order of F. H. Hathborn who endorsed it in blank. On trial P proved the above and rested. D offer to prove that P was not the real owner of the note or party in interest, that proper plaintiff was the Saratoga Co. Bank to whom the note was transferred and should be the P in this action. Evidence was excluded as immaterial.

Law: Ordinarily it is no defense to the party sued upon commercial paper to show that the transfer under which P holds it is without consideration or subject to equities between him and his assignor, or colorable and merely for the purpose of collection, or to secure a debt contracted by an agent without sufficient authority. It is sufficient to make the P the real party in interest, if he have the legal title either by written transfer or delivery, whatever may be the equities between himself and assignor. But to be entitled to sue he must now have the right of possession and ordinarily be the legal owner. Such ownership may have been acquired without adequate consideration but it must be sufficient to protect the D upon a recovery against him from a subsequent action by the assignor.

The production of the note by P was prima facie evidence that it had been delivered to him by the payee and that he had title to it but the D's offer was to rebut this presumption and should have been received as evidence.

Decision: Judgment reversed.

Hunter v. Allen & Bacon
127 A. D. 572 - 1908.

Action on promissory notes.
Appeal from judgment for P.

Facts: Allen, of the firm of "I.N.E. Allen & Co.", was interested in a lumber company in North Carolina. The First National Bank of Durham, N. C. was accustomed to allow this lumber company to overdraw its account and to draw on "I.N.E.Allen & Co." of New York for the overdue amount. Either to meet these drafts or to furnish money for the lumber company, the D, Allen, sent these notes to either the president of the lumber company or the bank's cashier, which were payable to the order of the lumber company, signed "I.N.E.Allen & Co" but the date, time of payment and amount was blank. The cashier filled in these blanks, had the lumber company endorse the notes and paid the notes. On maturity they were not paid and were endorsed thereafter to P, who claims bank, and therefore he was a bona fide holder.

Law: The bank was not a bona fide holder. When the cashier received the notes they were not complete and could only be made so by filling in the amount, date and time of payment.

Under Sec. 91 Negotiable Instrument Law and by the law merchant, one who buys commercial paper which remains in some essential particular incomplete and imperfect does not acquire the character of a bona fide holder.

Decision: Judgment reversed.

Havana Central R.R. V. Unickenbocker Trust Co.
198 N. Y. 422 - 1910.

Action upon three checks.
Appeal from judgment for P.

Facts: P opened an account with Central Trust Co. by which checks drawn upon said account were to be signed as follows: "Havana Central Railroad Co. C. W. Van Voort Treasurer." P treasurer drew three checks payable to himself and signed in the above required manner, deposited them to his own personal account and subsequently drew out the money. D presented the checks at P's bank, the Central Trust Co., which honored the checks. P claimed its treasurer had no authority to draw checks payable to his own order; that it was not enough that D inquired at P's bank and was informed that checks were O. K. and that D should have inquired from the P whether the checks were bona fide. D claimed it acted in good faith and upon P's bank acceptance of the checks.

Law: When a corporation opens an account with a bank it confers on it the power to determine whether any check drawn upon the account conforms to to the contract between the depositor and depository. When it makes a mistake in the determination of such a question the depository may be liable to the depositor; but the depositor cannot recover back the money paid on such check to a third person who has received it in good faith relying on the representation of the deposit bank that the check was O. K. and has subsequently parted with the money.

The distinguishing feature between this case and cases relied on by the P is that in the latter's cases the form of the transaction was notice to the party receiving the check that it was sought to be used to pay an individual debt out of trust funds. Here, on their face, checks were not designed to discharge any obligation owing to the D. D merely collected the amounts and credited them to credit of the payee.

Decision: Judgment reversed.

Compare with Case 49.

Havana Cent. R.Co. v. Central Trust Co.of N. Y.
204 Federal Reports 546 - 1913.

Action for breach of duty in paying checks.
Appeal from judgment in favor of D.

Facts: On Feb. 23, 1906, C. W. Van Voorhis, treasurer of P, the Havana Central R. Co., opened a deposit account in its name with D, Central Trust Co. The account became active, further deposits were made and checks were drawn upon it signed "Havana Cent. R. Co., C.W.Van Voorhis, Treas." Among the checks so drawn and signed were three upon which this action is based. These checks were for $26,461.81; $21,944.55 and $15,000., respectively and were payable to W. M. Greenwood or C. W. Van Voorhis. They were indorsed by said Van Voorhis and not by said Greenwood; were deposited in the individual account of the former in the Knickerbocker Trust Company; were presented by that Company to D and were paid by it. Said Van Voorhis had no right to such checks and his acts in drawing them amounted to a criminal misappropriation of funds. The action was based upon an alleged breach of duty upon the part of D in paying the checks.

Law: One who receives from an officer of a corporation corporate funds for his individual use, drawn by himself in his own favor, for such officers personal debts, does so at his peril, and is put on inquiry, whether such officer had authority to the use of corporation's property.

A bank in which corporate funds are deposited is not a trustee, quasi trustee, factor, or agent of the corporation, but debtor only.

D was not charged with notice, from the mere fact that the checks were drawn to the treasurer's own order; that they were being improperly used, and hence was not liable to repay the amount to the corporation.

Where a bank has knowledge that an officer of a corporation depositor is using a check on the corporations funds for his personal benefir, e. g., to pay his own debt, to the bank, or to deposit it to his personal credit, the bank is then put on inquiry and, if it fails, to make it, pays at its peril, not because it is agent of the corporation, but because the bank cannot discharge its

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debts to its depositor, except on the depositor's authorised order.

While a bank in which a corporation has a deposit account is charged with notice of the provisions of corporation's charter, with reference to authority of its officers, it is not charged with notice of by-law requiring a counter-signature on all checks drawn against corporation.

Decision: Judgment affirmed.

Ward v. City Trust Co. Impleaded
192 N. Y. 61 - 1908.

Action to recover amount of a check.
Complaint dismissed.

Facts: Umstead and Kiefer obtained a loan of $125,000. from the City Trust Co. with which they purchased all the stock of the Hartman Manufacturing Co. and deposited such stock with the Trust Co. as security for the loan and as collateral for their promissory note for amount of the loan. Subsequently Umstead was elected president and Kiefer secretary and treasurer of the Hartman Co. Board of directors empowered Umstead to sign all its checks. Later Umstead and Kiefer misrepresented to Hanover Bank that the previous loan made by D to them was made for the Hartman Co. and influenced Hanover Bank to lend the Hartman Co. $200000. to be secured by the stock held by the D. To pay the promissory note owed by Umstead to D, Hanover Bank gave Umstead a check payable to Hartman Manufacturing Co. for $125,000. Umstead indorsed the note by signing his name as president and general manager after "Hartman Mfg. Co." D took the check and cancelled the note. Question whether D was a holder in due course. Hartman Mfg. Co. later failed. D made no inquiry as to check.

Law: The form of the check was notice to D that Umstead was using the property of the Hartman Mfg. Co. to pay his personal debt and effect of such notice was to put D upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim.

Presumption arising from the face of the check was that it belonged to Hartman Co. and that its president had no right to use it to pay his personal debts. To rebut such presumption the D should have made due inquiry as to the validity of the check and if reasonable inquiry would have revealed that the check really belonged to Umstead or that it was being used by him in a manner authorized by the Hartman Co. the presumption would have been overcome and D would have been protected.

Decision: Judgment reversed, 4 for; 2 against.

Bischaff v. Yorkville Bank
218 N. Y. 106 - 1916.

Appeal from judgment for P.

Facts: In March 1908 one Poggenburg was appointed executor of the will of Josephine F. Schneider, deceased. P, here, became successor in Dec. 1914. In April Poggenburg deposited estate funds with Bowery Bank in New York as executor. He had at that time his individual funds deposited with the D, Yorkville Bank. In April 1908, Poggenburg by mail, sent to D a check upon Bowery Bank for $500. payable to order of D, signed "Estate of Jos. F. Schneider by H. I. Poggenburg, Ex." D received check in due course, indorsed and transmitted it to Bowery Bank, which paid it out of estate (trust) funds. D placed proceed of it to credit of Poggenburg in his individual account. Between April 1908 and Nov. 1911 D received 29 similar checks, except one which was payable to Poggenburg, and by him indorsed, payable to the order of D. Amount of checks aggregated $14,005. In April 1908 D owned promissory note of Poggenburg for $1,750. which matured June 3, 1908. Poggenburg paid $765. on note and renewed note for a thousand dollars and paid it when it became due. This was paid from his individual account. Surrogate Court decreed Poggenburg was liable on 30 checks drawn from Bowery Bank and deposited to his individual account in Yorkville Bank. Court also decreed that all the funds so withdrawn were used in payment of a forementioned notes, or used for Poggenburg's personal purposes. P, was allowed to recover the sum of these funds, less $675.96 with interest and costs.

Law: A fiduciary may legally deposit the trust funds in a bank to his individual account and credit. Bank has the right to assume that the fiduciary will apply the funds to their proper purposes under the trust and does not become a privy to a misappropriation by merely paying or honoring the checks of a depositor drawn upon his individual account in which there are, to the knowledge of the bank credits created by deposits of trust

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funds. But its participation in a diversion of such funds may result from either acquiring an advantage or benefit directly through or from diversion or joining in a diversion in which it was not interested, with actual notice or knowledge that the diversion was intended or was being executed, and thereby becoming privy to it.

Where an executor deposited trust funds to his individual account by checks upon another bank which were signed by him in the name of the estate, and afterward paid from such deposits then consisting wholly of trust funds a personal indebtedness to the bank of deposit, the depository is not only liable for the diversion of the sum received by it, but is charged by the law to take the reasonable steps or action essential to keep it from thereafter paying to the executor or his own the moneys which were not his but were trust funds, and was bound by the information which it could have obtained if an inquiry on its part had been pushed until the truth had been ascertained, and on failure to do so will be held liable for moneys so paid out.

Decision: Judgment modified as to amount.

Schlesinger, as Receiver etc. v. Gilhooly
189 N. Y. 1 - 1907.

Action on promissory note.
Appeal from judgment for P.

Facts: Note made by D payable to his order. Complaint alleged "before maturity the note was indorsed by D in blank and delivered to Wm. Muirhead and was thereafter, prior to maturity, discounted by said bank in due course and for value." The bank, discounting the note was a federal bank - "Federal Bank of New York". Evidence showed the notes were usurious as between D and Muirhead. Question whether the bank could enforce said note.

Law: The State Law originally provided that a usurious note was void and could not be recovered upon by any holder.

The National Banking Act then provided that the national banks are subject only to the forfeiture of interest only on account of usury and so - meaning Congress - make this the sole rule on that subject, to the exclusion of all state laws.

The State then inacted law making the state banks subject to the same forfeiture as the national banks were subject to.

Promissory notes, void for usury as between the original parties are nevertheless valid and enforcible when discounted by a state bank for value before maturity in the due course of business, without notice of their usurious inception.

Decision: Judgment affirmed. Two justices concur with Vann J., who wrote the prevailing opinion; Bartlett J. concurs in result on ground that under Sec. 96 Negotiable Instrument Law a bona fide purchaser takes a note free from defense of usury; Werner and Hiscock, J. J. concur with Cullen Ch. J. who wrote the dissenting opinion.